SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 751

ROY T. MOBLEY, PETITIONER,

vs.

THE NEW YORK LIFE INSURANCE COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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[fols. a & b] [Captions omitted]

[fol. 1]

IN CIRCUIT COURT OF HARRISON COUNTY

To December Term, 1933

No. 9617. Biloxi No. 998

ROY T. MOBLEY, Plaintiff,

versus

NEW YORK LIFE INSURANCE COMPANY, Defendant

[fol. 2] DECLARATION—Filed July 25, 1933

Plaintiff, Roy T. Mobley, would respectfully show unto the Court the following facts, to-wit:

That he is a resident citizen of the State of Mississippi.

That the defendant, New York Life Insurance Company, is a corporation duly organized and existing under the laws of the State of New York, and is a citizen of the State of New York, with its home office at No. 346 Broadway, New York, N. Y.

Plaintiff avers that said defendant, New York Life Insurance Company, is engaged in the business of writing life insurance for remuneration, and on the 7th day of August, 1928, issued its policy of insurance upon the life of plaintiff herein in the sum of five thousand dollars, with the further agreement that the company agreed to pay to the said insured the sum of fifty dollars each month and waive payment of premiums as provided in said policy, upon plaintiff's paying to the said defendant the sum of sixty-six dollars and thirty-five cents as advance payment of premium, and a like sum every six months thereafter which also included the sum of two dollars and sixty cents for double indemnity and six dollars and fifty cents for the disability benefits that were provided in said policy.

That it thereupon became and was the duty of the defendant company to carry out the agreements stipulated in said policy, the original of which said policy is hereto attached, marked Exhibit "A".

Plaintiff avers that said policy provided that whenever the insured is disabled by bodily injury or disease that he [fol. 3] is wholly prevented from performing any work from following any occupation, or from engaging in any business for remuneration or profit, and upon receipt of proof by the company that the insured is totally disabled as above defined and will be continuously disabled for life, that the said company would waive premiums and would pay the sum of ten dollars per thousand upon the face of the policy, monthly.

Plaintiff avers that he became totally and permanently disabled after the issuance of said policy and while it was still in full force and effect, and furnished proof to the said company that he was totally and permanently disabled and said company waived premiums for several months and paid him disability payments at the rate of fifty dollars per month for several months including up and until January 13th, 1933, but on said date, to-wit, January 13th, 1933, the defendant willfully and wrongfully declined to make any further payments because of the total and permanent disability and notified plaintiff on March 1st, 1933, that it would not make any further payments under said policy and wholly breached its policy on said date.

Plaintiff avers that on March 9th plaintiff, through the attorneys authorized to represent him, made demand upon said defendant company for the total sum of twenty-eight thousand nine hundred eighty dollars, being the cash value of the life expectancy of the said insured that he was entitled to recover under said policy, and on March 16th said defendant company, by letters addressed to the attorneys for the plaintiff, advised plaintiff that they would review the file, and on March 17th said defendant company, by letter addressed to the attorneys for the plaintiff, declined to make said payment or to make any further disability payments and completely breached said contract.

[fol. 4] Plaintiff avers that he is now, and has been for many months prior to March 1st, 1933, totally and permanently disabled by bodily injury and disease, having become so disabled while said policy was still in full force and effect, and that plaintiff has made application to the defendant company for all disability benefits provided in his policy and furnished due proof that he was totally and permanently disabled, and said company has declined, as afore-

said, to pay said disability benefits monthly as they fell due under the policy, but on March 1st, 1933, as aforesaid, wholly breached its contract, and that the said defendant has made no payments in any amount whatever since the January 1933 payment, heretofore alleged.

Plaintiff avers that the defendant has wholly failed, neglected and refused to pay for him the premium which became due on February 2nd, 1933, as it was required to do under said policy.

Plaintiff avers that said defendant has totally breached, rejected and repudiated its said contract of insurance with the plaintiff, and all without just cause.

Plaintiff avers that he is now 33 years of age and has a life expectance of — years. That during the remainder of his life he will continue to be totally disabled and prevented from performing any work for compensation or profit or from following any gainful occupation whatsoever. That the sum of fifty dollars per month for a period of — years amounts to the sum of twenty-eight thousand nine hundred eighty dollars.

Plaintiff avers that because he is now totally and permanently disabled, he is not an insurable risk and is not able to take out a policy of insurance payable in a lump sum upon his death.

[fol. 5] Plaintiff avers that by reason of the breach, rejection and repudiation of the aforesaid policy, No. 10,340,538, by the said defendant company, plaintiff is entitled to recover, in addition to the monthly benefits, the value of the policy of five thousand dollars.

Wherefore, plaintiff sues and demands judgment against said defendant company in the sum of thirty-three thousand nine hundred eighty dollars ($33,980).

Roy T. Mobley, Plaintiff. Mize, Thompson & Mize, Attorneys.

EXHIBIT "A" TO DECLARATION

New York Life Insurance Company,

A Mutual Company,

Agrees to pay to Eunice H., Wife of the Insured Beneficiary (with right on the part of the Insured to change the Beneficiary in the manner provided herein) Five Thou-

sand Dollars (The Face of This Policy) upon receipt of due proof of the death of Roy T. Mobley the Insured, or Ten Thousand Dollars (Double the Face of This Policy) if such death resulted from accident as defined under "Double Indemnity" and subject to the provisions therein set forth.

And upon receipt of due proof that the Insured is totally and presumably permanently disabled before age 60, as defined under "Total and Permanent Disability", The Company agrees to pay to the insured Fifty Dollars each month, and to waive payment of premiums, as provided therein.

[fol. 6] This contract is made in consideration of the application therefor and of the payment in advance of the sum of $66.35, the receipt of which is hereby acknowledged, constituting the first premium and maintaining this Policy for the period termination on the Seventh day of February Nineteen Hundred and Twenty-Nine, and of a like sum on said date and every Six calendar months thereafter during the life of the Insured.

(The above premium included $2.60 for the Double Indemnity Benefit and $6.50 for the Disability Benefits.)

The premium paying period may be shortened by application of dividend additions and dividend deposits as provided herein.

This Policy takes effect as of the Seventh day of August Nineteen Hundred and Twenty-Eight, which day is the anniversary of the Policy.

The Benefits and Provisions printed or written by the Company on the following pages are a part of this contract as fully as if they were recited at length over the signatures hereto affixed.

In Witness Whereof the New York Life Insurance Company has caused this contract to be signed this Seventh day of August Nineteen Hundred and Twenty-Eight,

Darwin P. Kingsley, President. Frederick M. Johnson, Secretary. E. E. M. Xieman, Registrar.

928-6 O. L. D.-D. 1.
Age 26.
Examined NMW.
NMW.

[fol. 7] Insurance Payable at Death. Premiums Payable During Life Unless Dividends Applied to Shorten Premium Paying Period. Disability Benefits. Double Indemnity for Fatal Accident. Annual Participation in Surplus.

Double Indemnity

The Double Indemnity provided on the first page hereof shall be payable upon receipt of due proof that the death of the Insured resulted directly and independently of all other causes from bodily injury effected solely through external, violent and accidental means and occurred within ninety days after such injury.

Double Indemnity shall not be payable if the Insured's death resulted from self-destruction, whether sane or insane; from the taking of poison or inhaling of gas, whether voluntary or otherwise; from committing an assault or felony; from war or any act incident thereto; from engaging in riot or insurrection; from participation as a passenger or otherwise in aviation or aeronautics; or, directly or indirectly, from infirmity of mind or body, from illness or disease, or from any bacterial infection other than bacterial infection occurring in consequence of accidental and external bodily injury. The Company shall have the right and opportunity to examine the body, and to make an autopsy unless prohibited by law.

Double indemnity shall not apply to the Temporary Insurance or to the Paid-up Insurance provided herein under "Surrender Values", or to any Dividend Additions provided under "Participation in Surplus—Dividends".

Upon written request of the Insured on any anniversary [fol. 8] of this Policy and upon return of this Policy for proper indorsement, the Company will terminate this provision and thereafter the premium shall be reduced by the amount charged for the Double Indemnity Benefit.

Total and Permanent Disability

Disability shall be considered total whenever the Insured is so disabled by bodily injury or disease that he is wholly prevented from performing any work, from following any occupation, or from engaging in any business for remuneration or profit, provided such disability occurred after the insurance under this Policy took effect and before the

anniversary of the Policy on which the Insured's age at nearest birthday is sixty.

Upon receipt at the Company's Home Office, before default in payment of premium, of due proof that the Insured is totally disabled as above defined, and will be continuously so totally disabled for life, or if the proof submitted is not conclusive as to the permanency of such disability, but establishes that the Insured is, and for a period of not less than three consecutive months immediately preceding receipt of proof has been, totally disabled as above defined, the following benefits will be granted.

(a) Waiver of Premium.—The Company will waive the payment of any premium falling due during the period of continuous total disability, the premium waived to be the annual, semi-annual or quarterly premium according to the mode of payment in effect when disability occurred.

[(b) Income Payments.—The Company will pay to the Insured the monthly income stated on the first page hereof ($10 per $1,000 of the face value of this Policy) for each [fol. 9] completed month from the commencement of and during the period of continuous total disability.] If disability results from insanity, payment will be made to the beneficiary in lieu of the Insured.

In event of default in payment of premium after the Insured has become totally disabled as above defined, the Policy will be restored and the benefits shall be the same as if said default had not occurred, provided due proof that the Insured is and has been continuously from date of default so totally disabled and that such disability will continue for life or has continued for a period of not less than three consecutive months, is received by the Company not later than six months after said default.

The total and irrecoverable loss of the sight of both eyes or of the use of both hands or of both feet or of one hand and one foot shall constitute total disability for life.

Before making any income payment or waiving any premium, the Company may demand due proof of the continuance of total disability, but such proof will not be required oftener than once a year after such disability has continued for two full years.

Upon failure to furnish such proof, or if the Insured performs any work, or follows any occupation, or engages in

any business for remuneration or profit, no further income payments shall be made nor premiums waived.

The sum payable in any settlement of the Policy shall not be reduced by income payments made nor by premiums waived under the above provisions. Dividends, loan and surrender values shall be the same as if the waived premi- [fol. 10] ums had been duly paid. Any disability benefit due but unpaid at the time of the Insured's death shall be payable to the person entitled to the proceeds of the Policy.

Disability Benefits shall not auply if the disability of the Insured shall result from self-inflicted injury or from military or naval service in time of war; nor shall these benefits apply to the Temporary Insurance or to the Paid-up Insurance provided herein under "Surrender Values", or to any Dividend Additions provided under "Participation in Surplus—Dividends".

Any premium due on or after the anniversary of the Policy on which the age of the Insured at nearest birthday is sixty, will be reduced by the amount of premium charged for Disability Benefits. Upon written request of the Insured on any anniversary of this Policy and upon return of this Policy for proper indorsement, the Company will terminate this provision and thereafter the premium shall be reduced by the amount charged for Disability Benefits.

Participation in Surplus—Dividends

The proportion of divisible surplus accruing upon this Policy shall be ascertained annually. Beginning at the end of the second insurance year, and on each anniversary thereafter, such surplus as shall have been apportioned by the Company to this Policy shall at the option of the Insured be either

(a) Paid in cash; or

(b) Applied toward payment of premiums; or

(c) Applied to purchase a participating paid-up addition to the sum insured (herein referred to as Dividend Additions); or

[fol. 11] (d) Left to accumulate at such rate of interest as the Company may declare on funds so held, but at a rate never less than three per cent compounded and cred-

ited annually. Such accumulated dividends (herein referred to as Dividend Deposits) may be withdrawn in cash by the Insured on any anniversary of the Policy or shall be payable at the maturity of the policy to the person entitled to its proceeds.

If no option is selected, the dividend will be applied to the purchase of a dividend addition to the sum insured. The Insured may surrender any dividend addition for cash at any time not later than three months after any default in the payment of premium, and the cash value thereof shall never be less than the original cash dividend.

Dividends May Be Applied to Decrease Number of Premium Payments or Mature Policy as An Endowment

Whenever the cash value of the Policy including the cash value of any dividend additions and dividend deposits shall equal the net single premium at the attained age of the Insured for a fully paid participating Policy of the same kind and amount as this policy, calculated on the same basis as the premium on this Policy, the Company, upon written request of the Insured, will endorse this Policy as fully paid, whereupon the payment of premium will be discontinued; or, whenever said cash value shall equal the face amount of this Policy, the Company, upon due surrender of the Policy, will pay the face amount of the Policy in cash, less any indebtedness to the Company.

Miscellaneous Benefits

Assignment. —Any assignment of this Policy must be made in duplicate and one copy filed with the Company at [fol. 12] its Home Office. The Company assumes no responsibility for the validity of any assignment.

Change of Beneficiary.—The Insured may from time to time change the beneficiary, unless otherwise provided by indorsement on this Policy or unless there be an existing assignment of this Policy. Every change of beneficiary must be made by written notice to the Company at its Home Office accompanied by the Policy for indorsement of the change thereon by the Company, and unless so indorsed the change shall not take effect. After such indorsement the change will relate back to and take effect as of the date

the Insured signed said written notice of change whether the Insured be living at the time of such indorsement or not, but without prejudice to the Company on account of any payment made by it before receipt of such written notice at its Home Office. In the event of the death of any beneficiary before the Insured the interest of such beneficiary shall vest in the Insured, unless otherwise provided herein.

Grace.—If any premium is not paid on or before the day it falls due the policy-holder is in default; but a grace of one month (not less than thirty days) will be allowed for the payment of every premium after the first, during which time the insurance continues in force. If death occurs within the period of grace the overdue premium will be deducted from the amount payable hereunder.

Interest Allowed at Settlement of Death Claim.—Interest will be allowed on the proceeds of the Policy payable as death claim from date of receipt of due proof of death at any office of the Company until the date settlement is made at the Home Office. Interest shall be at the rate [fol. 13] declared by the Company on such funds, but at a rate not less than three per cent per annum.

Reinstatement.—This Policy may be reinstated at any time within five years after any default, upon written application by the Insured and presentation at the Home Office of evidence of insurability satisfactory to the Company and upon payment of overdue premium with six per cent interest thereon from their due date. Any indebtedness to the Company at date of default must be paid or reinstated with interest thereon in accordance with the loan provisions of the Policy.

Privilege of Change to Other Plans of Insurance.—At any time before default in payment of premium, provided the insured is less than 55 years of age and has not become disabled under the disability provisions hereof, the Insured may, without medical re-examination, exchange this Policy for a Policy upon any plan of insurance having a higher rate of premium issued by the Company at the time this Policy takes effect for the same amount as this Policy and containing the same Disability and Double Indemnity Benefits. Such exchange shall be effective upon surrender

of this Policy and the payment of the difference in premiums with compound interest at the rate of six per cent per annum from the due date of each premium to the date of exchange; allowance will be made for any larger cash dividends on the new plan. The new Policy will take effect as of the date of this Policy and the premium will be at the rate which would have been charged if the Policy had been originally issued on the new plan.

Residence, Travel and Occupation.—This Policy is free of conditions as to residence, travel, occupation, and mili- [fol. 14] tary or naval service, except as provided herein under Disability and Double Indemnity Benefits.

Rights of Insured.—The Insured, during his life time, and without the consent of the beneficiary, may receive every benefit, exercise every right and enjoy every privilege conferred upon the Insured by this Policy, unless otherwise provided by indorsement hereon.

Optional Methods of Settlement

The Insured, or in case the Insured shall not have done so, the beneficiary after the Insured's death, may, by written notice to the Company at its Home Office, make the proceeds of this Policy, in whole or in part, payable under one of the following options. Any such election or change in election shall not take effect until indorsed on the Policy by the Company at its Home Office. The optional methods of settlement are available whether such proceeds are payable as a death claim or on maturity as an Endowment, or upon surrender of the Policy for its cash value, provided the instalment of interest payment to any payee is not less than $10.

Option 1.—The proceeds in whole or in part may be left with the Company subject to withdrawal at any time on demand in sums of not less than one hundred dollars. The Company will credit interest annually on the net proceeds so left with it at such rate as it may each year declare on such funds, and guarantee that the rate shall not be less than three per cent.

Option 2.—The proceeds in whole or in part may be made payable in equal annual, semi-annual, quarterly or monthly

instalments for a fixed period as may be agreed upon, in accordance with the following table.

[fol. 15] Option 3.—The proceeds in whole or in part may be made payable in equal annual, semi-annual, quarterly or monthly instalments for a fixed period of five, ten or twenty years, as may be agreed upon, and for the remaining lifetime of the payee, in accordance with the following table.

Option 4.—The proceeds in whole or in part may be left with the Company at interest until the death of the payee. The Company will pay interest thereon annually, semi-annually, quarterly or monthly, as may be agreed upon, at such rate as the Company may declare each year on such funds, and guarantees that the interest per one thousand dollars of the proceeds shall be not less than $30 when paid annually, $14.89 when paid semi-annually, $7.42 when paid quarterly, or $2.47 when paid monthly.

Option 5.—The proceeds in whole or in part may be left with the Company at interest and paid in equal annual, semi-annual, quarterly or monthly instalments of such amount as may be agreed upon until the entire proceeds left with the Company, including interest thereon as provided in Option 1 have been paid, provided that the fixed amount payable each year shall be not less than five per cent of the original proceeds left with the Company.

The first instalment under Options 2 and 3 will be payable on the date when the proceeds of the Policy become due and the instalment payment on each anniversary of the first payment will be increased by such additional interest, in excess of three per cent per annum, as the company may declare on such funds for that year. The additional interest under Option 2 will be calculated on the unpaid instalments commuted at three per cent per annum, and under [fol. 16] Option 3 on the unpaid instalments for the fixed period selected, computed at three per cent per annum.

When the proceeds of the Policy become payable the Company will deliver to each payee a certificate evidencing the rights and benefits of such payee under the option selected.

At the death of any payee any unpaid sum left with the Company under Options 1, 4 or 5 with accrued interest to

date of payment, or the commuted value at three per cent of any unpaid instalments, under Option 2, or the commuted value at three per cent of any unpaid instalments for the fixed period selected under Option 3, will be paid in one sum to the executors or administrators of the payee, unless otherwise agreed in writing.

Unless otherwise directed in writing by the Insured, the benefits under the above options shall not be transferable nor subject to commutation or incumbrance during the lifetime of the payee.

Monthly and Annual Payments for each $1,000 of Proceeds of Policy

The semi-annual and quarterly instalments are 50.37% and 25.28% of the annual instalment under Option 2, and not less than these respective percentages under Option 3.

[fol. 17]

Option 2

Number of years' payments	Monthly payment	Annual payment	Number of years' payments	Monthly payment	Annual payment
2	$42.86	$507.39	17	$6.23	$73.74
3	28.99	343.23	18	5.96	70.59
4	22.06	261.19	19	5.73	67.78
5	17.91	211.99	20	5.51	65.25
6	15.14	179.22	21	5.73	67.78
7	13.16	155.83	22	5.15	60.91
8	11.68	138.30	23	4.99	59.04
9	10.53	124.69	24	4.84	57.32
10	9.61	113.81	25	4.71	55.75
11	8.86	104.92	26	4.59	54.30
12	8.24	97.53	27	4.47	52.97
13	7.71	91.29	28	4.37	51.74
14	7.26	85.94	29	4.27	50.59
15	6.87	81.32	30	4.18	49.53
16	6.53	77.29			

[fol. 18]

Option 3—Life Income to Payee With Income Guaranteed For

Age of payee when proceeds become payable	5 Years Certain		10 Years Certain		20 Years Certain	
	Monthly payment	Annual payment	Monthly payment	Annual payment	Monthly payment	Annual payment
10 and under	$3.81	$44.85	$3.75	$44.21	$3.58	$42.20
11	3.83	45.07	3.77	44.41	3.59	42.36
12	3.85	45.30	3.79	44.62	3.61	42.54
13	3.87	45.54	3.81	44.84	3.62	42.71
14	3.89	45.78	3.83	45.07	3.64	42.90
15	3.91	46.03	3.85	45.29	3.65	43.08
16	3.94	46.27	3.87	45.53	3.67	43.27
17	3.96	46.52	3.89	45.76	3.69	43.47
18	3.98	46.77	3.91	45.99	3.70	43.66
19	4.00	47.02	3.93	46.23	3.72	43.87
20	4.02	47.28	3.95	46.48	3.74	44.07
21	4.05	47.55	3.97	46.74	3.76	44.29
22	4.07	47.84	4.00	47.01	3.78	44.52

Option 3—Life Income to Payee With Income Guaranteed For

Age of payee when proceeds become payable	5 Years Certain		10 Years Certain		20 Years Certain	
	Monthly payment	Annual payment	Monthly payment	Annual payment	Monthly payment	Annual payment
23	4.10	48.14	4.02	47.20	3.80	44.75
24	4.12	48.45	4.05	47.59	3.82	45.00
25	4.15	48.77	4.07	47.90	3.84	45.25
[fol. 19]						
26	4.18	49.12	4.10	48.22	3.86	45.51
27	4.21	49.47	4.13	48.56	3.89	45.79
28	4.25	49.85	4.16	48.91	3.91	46.07
29	4.28	50.24	4.19	49.28	3.94	46.37
30	4.32	50.65	4.23	49.66	3.96	46.67
31	4.35	51.08	4.26	50.07	3.99	46.99
32	4.39	51.53	4.30	50.49	4.02	47.32
33	4.43	52.01	4.33	50.93	4.05	47.66
34	4.48	52.50	4.37	51.39	4.08	48.01
35	4.52	53.02	4.42	51.87	4.11	48.38
36	4.57	53.56	4.46	52.38	4.14	48.75
37	4.62	54.13	4.51	52.90	4.17	49.14
38	4.67	54.73	4.55	53.45	4.21	49.54
39	4.73	55.36	4.60	54.03	4.24	49.96
40	4.78	56.02	4.65	54.63	4.28	50.38
41	4.84	56.71	4.71	55.26	4.32	50.82
42	4.91	57.43	4.77	55.91	4.35	51.27
43	4.97	58.19	4.83	56.60	4.39	51.73
44	5.04	58.99	4.89	57.31	4.43	52.20
45	5.12	59.83	4.99	58.06	4.48	52.69
46	5.19	60.71	5.02	58.84	4.52	53.18
[fol. 20]						
47	5.27	61.64	5.09	59.66	4.56	53.68
48	5.36	62.61	5.17	60.51	4.60	54.20
49	5.45	63.63	5.24	61.40	4.65	54.71
50	5.54	64.70	5.32	62.33	4.69	55.24
51	5.64	65.83	5.41	63.30	4.74	55.77
52	5.74	67.02	5.49	64.30	4.78	56.30
53	5.85	68.26	5.58	65.35	4.83	56.84
54	5.97	69.57	5.68	66.44	4.87	57.37
55	6.09	70.95	5.78	67.57	4.92	57.90
56	6.22	72.40	5.88	68.75	4.96	58.43
57	6.35	73.93	5.98	69.98	5.00	58.95
58	6.49	75.53	6.09	71.24	5.05	59.46
59	6.64	77.22	6.21	72.55	5.09	59.96
60	6.80	78.99	6.32	73.91	5.13	60.45
61	6.96	80.85	6.44	75.31	5.17	60.92
62	7.13	82.81	6.57	76.75	5.20	61.37
63	7.31	84.87	6.70	78.23	5.24	61.80
64	7.51	87.03	6.83	79.75	5.27	62.20
[fol. 21]						
65	7.71	89.31	6.96	81.30	5.30	62.59
66	7.92	91.69	7.09	82.89	5.33	62.94
67	8.14	94.19	7.22	84.50	5.36	63.27
68	8.37	96.81	7.37	86.14	5.38	63.57
69	8.61	99.56	7.51	87.79	5.40	63.84
70	8.86	102.43	7.65	89.46	5.42	64.08
71	9.13	105.44	7.79	91.12	5.44	64.29
72	9.40	108.57	7.93	92.79	5.45	64.48
73	9.69	111.84	8.07	94.44	5.47	64.64
74	9.99	115.25	8.21	96.06	5.48	64.77
75	10.30	118.78	8.34	97.65	5.48	64.88

Option 3—Life Income to Payee With Income Guaranteed For

Age of payee when proceeds become payable	5 Years Certain		10 Years Certain		20 Years Certain	
	Monthly payment	Annual payment	Monthly payment	Annual payment	Monthly payment	Annual payment
76	10.62	122.44	8.47	99.21	5.49	64.97
77	10.95	126.22	8.59	100.71	5.50	65.05
78	11.29	130.13	8.71	102.14	5.50	65.11
79	11.64	134.14	8.82	103.51	5.50	65.15
80	12.00	138.25	8.92	104.80	5.51	65.19
81	12.36	142.44	9.02	106.01	5.51	65.21
82	12.73	146.70	9.11	107.12	5.51	65.23
83	13.09	151.00	9.19	108.14	5.51	65.24
84	13.46	155.34	9.26	109.06	5.51	65.25
85 and over	13.83	159.67	9.32	109.89	5.51	65.25

[fol. 22] Guaranteed Loan and Surrender Values

Loans.—After three full years' premiums have been paid and before default in the payment of premium, the Company, upon receipt of this Policy and a Loan Agreement satisfactory to the Company, will advance to the Insured on the sole security of this Policy any amount which, with interest, shall be within the limit of the Cash Surrender Value of this Policy. Interest on the loan will be at the rate of six per cent per annum payable annually on the anniversary of the Policy. Any existing indebtedness to the Company on this Policy, including interest thereon, will be deducted from the amount of said loan. If interest is not paid when due it shall be added to the principal. All or any part of the indebtedness may be repaid at any time while the Policy is in force. Failure to repay such indebtedness or to pay interest will not avoid the Policy, but whenever the amount of the total indebtedness equals the Cash Surrender Value, the Policy shall become void one month after the Company shall have mailed notice to the last known address of the Insured and of the assignee of record, if any.

Surrender Values.—In event of default in payment of premium after three full years' premiums have been paid, the following benefits shall apply:

(a) Temporary Insurance.—Insurance for the face of the Policy plus any dividend additions and any dividend deposits and less the amount of any indebtedness hereon, shall, upon expiry of the period of grace, be continued automatically as Temporary Insurance as from the date of default for such term as the Cash Surrender Value less any indebt-

edness hereon will purchase as a net single premium at the attained age of the Insured, according to the American experience table of mortality and interest at 3 per cent. [fol. 23] This Temporary Insurance will be without participation in surplus.

(b) Participating Paid-up Insurance.—Within three months after such default, but not later, the Insured may surrender this Policy and elect in place of such Temporary Insurance to have this Policy indorsed for the amount of Participating Paid-up Insurance which the Cash Surrender Value at date of default less any indebtedness hereon, will purchase as a net single premium at the attending age of the Insured at the date of default according to the American experience table of mortality and interest at 3 per cent. The insured may obtain a loan on such Paid-up Insurance or Surrender it within one month after any anniversary for its cash surrender value.

(c) Cash Surrender Value.—If the policy shall not have been indorsed for Participating Paid-up Insurance, the Insured, within three months after such default, but not later, may surrender this Policy and all claims thereunder, and receive its Cash Surrender Value as at date of default less any indebtedness hereon. The Cash Surrender Value shall be the reserve on the face amount of the Policy at date of default, omitting fractions of a dollar per thousand of insurance, and the reserve on any outstanding dividend additions and any outstanding dividend deposits, and less a surrender charge for the third to the ninth years, inclusive, of not more than one and one-half per cent of the face of the Policy. The reserve shall be computed on the basis of the American experience table of mortality and interest at 3 per cent.

Cash Surrender Value of Fully Paid Policy.—If this Policy shall have become fully paid by its terms, the Insured may surrender the Policy and all claims thereunder within [fol. 24] one month after any anniversary of the policy and receive its cash surrender value less any indebtedness hereon. Such cash surrender value shall be computed on the basis described under (c) above.

The value in the "Table of Guaranteed Loan and Surrender Values" are computed in accordance with the above provisions, on the basis of $1,000 of face amount, assuming

that premiums have been duly paid for the number of years stated, that there is no indebtedness to the Company, that there are no outstanding dividend additions nor dividend deposits, and after deduction of the surrender charge, if any.

Table of Guaranteed Loan and Surrender Values

After policy has been in force	Cash surrender value or loan value for each $1,000 of face amount	Paid-up insurance for each $1,000 of face amount	Temporary insurance from date of default	
			Years	Days
3	$23	$61	2	335
4	30	78	3	297
5	39	100	4	353
6	47	121	6	42
7	61	151	7	302
8	74	182	9	200
9	88	212	11	89
10	102	241	12	317
11	114	265	14	16
12	127	288	15	34
13	139	311	16	4
14	153	334	16	287
15	166	356	17	161
16	180	379	17	357
17	194	401	18	147
18	208	423	18	268
19	223	444	18	358
20	239	465	19	55
[fol. 25]				
21	254	486	19	91
22	270	507	19	106
23	286	527	19	101
24	303	547	19	79
25 Years	319	566	19	41

Ed. June '16. O. L. 1,000. 26.

The Loan obtainable at the end of any year may be secured during that year (less interest) if the premium for the entire year has been paid. Values for later years will be computed on the same basis and will be furnished on request.

Term Insurance in Case of Loan

Any loan under this Policy may be covered by term insurance as follows:

1. The Insured must furnish evidence of insurability satisfactory to the Company.

2. The premium shall be computed at the attained age of the Insured at the time the term insurance is made or renewed.

3. Term insurance shall not extend beyond the next anniversary, but under the same conditions may be renewed from year to year. No term insurance shall be made or renewed after age sixty five.

4. If the indebtedness on account of a loan shall be reduced or repaid or shall be satisfied in accordance with the [fol. 26] terms of the Loan Agreement, the term insurance shall thereupon automatically be reduced or canceled accordingly and any unearned premium paid therefor will be refunded.

5. Term insurance takes effect upon delivery to the Insured of the Company's Policy therefor. The sum payable as term insurance shall be applied to the cancellation of the indebtedness.

Premiums for Each $100 of Term Insurance

Insured's attained age	Premium for one year	Insured's attained age	Premium for one year	Insured's attained age	Premium for one year
15	$0.73	32	$0.83	49	$1.26
16	0.74	33	0.84	50	1.33
17	0.74	34	0.85	51	1.40
18	0.74	35	0.86	52	1.48
19	0.75	36	0.87	53	1.57
20	0.75	37	0.89	54	1.67
21	0.76	38	0.90	55	1.79
22	0.76	39	0.92	56	1.91
23	0.77	40	0.94	57	2.05
24	0.77	41	0.96	58	2.21
25	0.78	42	0.99	59	2.38
26	0.78	43	1.01	60	2.57
27	0.79	44	1.04	61	2.78
28	0.79	45	1.07	62	3.01
29	0.80	46	1.11	63	3.26
30	0.81	47	1.15	64	3.65
31	0.82	48	1.20		

[fol. 27] For periods less than one year, the premium shall be at the rate of one-tenth of the one year's premium for each month and fraction of a month.

Other Provisions.

Age.—If the age of the Insured has been misstated, the amount payable hereunder shall be such as the premium paid would have purchased at the correct age.

Payment of Premiums.—All premiums are made payable on or before their due date at the Home Office of the Company or to an authorized agent of the Company, but only in exchange for the Company's Official premium re-

ceipt signed by the President, a Vice-President, a Second Vice-President, a Secretary or the Treasurer of the Company, and countersigned by the person receiving the premium. No person has any authority to collect a premium unless he then holds said official premium receipt. The premium may be made payable annually, semi-annually or quarterly in advance at the Company's respective rates for such modes of payment and the mode of payment may be changed by agreement in writing and not otherwise. The payment of the premium shall not maintain the Policy in force beyond the day when the next payment becomes due, except as to the benefits provided for herein after default in premium payment.

Indebtedness.—Any indebtedness to the Company against this policy will be deducted in any settlement thereof.

Self-Destruction.—In event of self-destruction during the first two insurance years, whether the Insured be sane or insane, the insurance under this Policy shall be a sum equal [fol. 28] to the premium thereon which have been paid to and received by the Company and no more.

The Contract.—The Policy and the application therefor, copy of which is attached hereto, constitute the entire contract. All statements made by the Insured shall, in absence of fraud, be deemed representations and not warranties, and no statement shall avoid the Policy or be used in defense to a claim under it, unless it is contained in the written application and a copy of the application is indorsed upon or attached to this Policy when issued. No agent is authorized to make or modify this contract, or to extend the time for the payment of premium, or to waive any lapse or forfeiture or any of the Company's rights or requirements. All benefits under this Policy are payable at the Home Office of the Company in the City and State of New York.

Incontestability.—This Policy shall be incontestable after two years from its date of issue except for non-payment of premium and except as to provisions and conditions relating to Disability and Double Indemnity Benefits.

Register of Change of Beneficiary.

Note.—No change of Beneficiary shall take effect unless indorsed on this Policy by the Company at the Home Office.

Date of request	Beneficiary	Indorsed by
.....	.....	.....
.....	.....	.....
.....	.....	.....

Indorsements

This copy should be carefully examined and if any error, or omission is found, full particulars with the number of the policy, should be sent immediately to the Home Office of the Company, No. 346 Broadway, New York City.

lo 340-538.

[fol. 29] Application to the New York Life Insurance Company—Part I

I, Roy Thurston Mobley. (Print name in full.)

1. Residence—State, Mississippi; County, Hinds; Town, Jackson; Street, Robinson, 508 Lampton Bldg., No. 1013 R. F. D.

Place of Business— ——.
Present Occupation—Atty. at Law.
State exact duties in full—Practicing Law.
Other Occupation— ——.
Born at Utica, Miss., on 3 day of June, 1902.
Name of Firm or Employer (if any)—Self. None.
Married. [Not Married.]* (Strike Out One.)
Race or Nationality—Cau.
Former Residence—Utica, Miss.
No answer required unless change has taken place within past two years.
Former Place of Business— ——.
Former Firm or Employer— ——.
Send all Communications to Residence. Place of Business. (Strike out one.)

Apply to the New York Life Insurance Company for Insurance as follows:

2. Sum to be Insured, $5,000. Premiums, how payable, Semi-annual. Age nearest birthday, 26.

3. Plan of Insurance—Ord. Life—

with { Disability benefits,
without { [Disability benefits increasing income.]*
Double Indemnity Benefit.

*[Words in brackets erased in copy.]

(Strike out benefits not desired.)
·1% monthly.
Date policy as of
{[Date of this Application.]*
{Date Policy is written.
(Strike out one.)

[fol. 30] 4. Dividend to be—

a. [Paid in cash;]*
b. [Applied toward payment of premiums;]*
c. [Applied to purchase additional paid up insurance;]*
d. Left to accumulate at interest, subject to my order;
e. [Applied on the Accelerative Endowment Plan.]*
(Strike out four.)

Note.—Option applied only to endowment policies containing the Accelerative Endowment option.

5. I designate as beneficiary to receive the proceeds of policy in event of death and reserve the right to change the Beneficiary from time to time. Beneficiary (Print name in full)—Eunice Hurst Mobley. Who resides at 1013 Robinson St., Jackson, Miss. Relationship to me—Wife.

6. a. The following is all the insurance I now have on my life; State name of company and amount. (If none, say none)—N. Y. Life, $2000.

b. The insurance for which I am now applying is not included to take the place of insurance carried with this or any other company. If it is, give particulars: None.

7. Of the insuranse on my life the amount which includes benefits in event of total disability is $——. (If none, say none)—None.

8. No company has declined to issue insurance on my life or issued or offered to issue insurance on my life differing [fol. 31] from the insurance applied for, except as follows: (If none, say none)—N. Y. L. Co. charged on extra prem. to 4/9/28 acct. operation.

9. Additions or Amendments (For Home Office use only): ——.

It is mutually agreed as follows: That the insurance hereby applied for shall not take effect unless and until the

*[Words in brackets erased in copy.]

policy is delivered to and received by the applicant and the first premium thereon paid in full during his lifetime, and then only if the applicant has not consulted or been treated by any physician since his medical examination; provided, however, that if the applicant, at the time of making this application, pays the agent in cash the full amount of the first premium for the insurance applied for in questions 2 and 3 and so declares in this application and receive from the agent a receipt therefor on the receipt form which is attached hereto, and if the Company, after medical examination and investigation, shall be satisfied that the applicant was, at the time of making this application, insurable and entitled under the Company's rules and standards to the insurance, on the plan and in the amount applied for in Questions 2 and 3, at the Company's published premium rate corresponding to the applicant's age, then said insurance shall take effect and be in force under and subject to the provisions of the policy applied for from and after the time this application is made, whether the policy be delivered to and received by the applicant or not. 2. That a receipt on the form attached as a coupon to this application form is the only receipt the agent is authorized to give for any payment made before the delivery of the policy. 3. That only the President, a Vice-President, a Second Vice-President, a Secretary or the Treasurer of the Company can make, modify or discharge contracts, or waive [fol. 32] any of the Company's rights or requirements; that notice to or knowledge of the soliciting agent or the Medical Examiner is not notice to or knowledge of the Company, and that neither one of them is authorized to accept risks or to pass upon insurability. 4. That by receiving and accepting said policy, any additions or amendments hereto which the company may make and refer to in Question 9 above, entitled "Additions or Amendments" are hereby ratified.

Dated at Jackson, Miss., this 28 day of July, 1928.

Signature of the person applying for insurance:

Roy Thurston Mobley.

(Write the name in full.)

Witnessed by W. G. Hunter.

Other Agents: x

Names and residences of— ——.

10-340-530.

Application to the New York Life Insurance Company—
Part II

10-340-538.

Notice to Medical Examiner: Use Only Black Ink. This Examination to be Photographed.

Do not use dashes or ditto marks in answering questions.

Answers to the Medical Examiner

This Examination must be made in private; no agent or third person being present.

[fol. 33] 1. A. What is your occupation? (Full details.) A. Lawyer.

B. How long have you been engaged in your present occupation? B. 1 Year.

C. What was your previous occupation? C. Student.

D. Have you ever changed your occupation or place of residence on account of your health? (If so give full details.) D. No.

2. Do you intend to change your occupation or make a journey outside of Continental United States or Canada? (If so give full details.) No.

3. A. How many aerial flights have you taken and when last? A. No.

B. State whether as passenger or pilot and whether you are a Reservist? B. No.

4. In what States have you lived in the last ten years, and which years in each? (If outside the U. S., in which countries and which years in each.) Miss.

5. A. How frequently, if at all, and in what quantity do you drink beer, wine, spirits or other intoxicants? A. No.

B. How frequently, if at all, and in what quantity. have you drunk any of them in the past? B. None.

C. Have you within the last five years drunk any of them to excess? C. No.

D. Do you now take or have you ever taken, morphine, cocaine, or any other habit forming drugs? D. No.

[fol. 34] 6. A. Have you now pending any other application for insurance on your life or for the reinstatement of insurance? "Yes" or "No". No. Names of each company or insurer.

B. Have you ever examined either on or in anticipation of an application for insurance without receiving such insurance? No.

C. Have you ever been declined for life insurance or for the reinstatement of life insurance? No.

D. Have you ever been offered a policy differing in plan or amount or in premium rate from that applied for? Yes, N. Y. Life, 1925. Operation Feb. 1921, for duolenal ulcer.

7. A. Have you had any accident or injury or undergone any surgical operation? "Yes" or "No." Yes. If the answer to any query is "Yes" give details and within five years name and address of every physician consulted. Operation for duolenal ulcer 1921.

B. Have you been under observation or treatment in any hospital, asylum or sanatorium? Yes, 13 days.

C. Has albumin or sugar been found in your urine? No.

D. Have you been found to have high blood pressure? No.

E. Have you raised or spat blood? No.

F. Have you gained or lost in weight in the last year? Gain? No. Lost? No. Cause? No.

[fol. 35]

	"Yes" or "No"	Name of ailment or disease	No. of attacks	Date	Duration	Severity	Results and if within five years name and address of every physician consulted
8. Have you consulted a physician for or suffered from any ailment or disease of							
A. The Brain or Nervous System?	No.						
B. The Heart, Blood Vessels or Lungs?	No.						
C. The Stomach or Intestines, Liver, Kidneys or Bladder	Yes.	Duodenal ulcer	1	1920	1 year	Severe Operation 1921	Dr. Peevey, Jackson, Miss.
D. The Skin, Middle Ear or Eyes?	No.						
9. Have you had Rheumatism, Gout or Syphilis?	No.						
10. Have you consulted a physician for any ailment or disease not included in your above answers?	No.						

[fol. 36]

	Name and address	Date	Reason for consultation, examination or treatment
11. What physician or physicians, if any, not named above, have you consulted or been examined or treated by within the past five years? (If none, say none)	None	No.	No

	Age if living	Condition of health, if not good, give full details	Age at death	Cause of death	How long ill
12. Family Record—					
Father	71	Good			
Mother	59	Good			
Brothers 4	35 to 23	All in good health			
Sisters	37	Good	2	Congestion Dy.	

[fol. 37] 13. A. Is any person in your immediate household now ill with consumption? (If so state who, and what precautions are being taken.) No.

B. Has any person in your immediate household suffered or dies of that disease within the past year? No.

On behalf of myself and of every person who shall have or claim any interest in any insurance made hereunder, I declare that I have carefully read each and all of the above answers, that they are each written as made by me, and that each of them is full, complete and true, and agree that the Company believing them to be true shall rely and act upon them.

I expressly waive on behalf of myself and of any person who shall have or claim any interest in any policy issued hereunder, all provisions of law forbidding any physician or other person who has heretofore attended or examined me, or who may hereafter attend or examine me, from disclosing any knowledge or information which he thereby acquired.

Dated this 28 day of July, 1928.

Signature of the person applying for Insurance:

Roy Thurston Mobley.

Witnessed by S. E. Huggin, M. D., Medical Examiner.

New York Life Insurance Company to Roy Mobley. No. 10,340,538. Amount, $5,000. Semi-Annual Premium $66.35, payable on the 7th day of August and February. Jackson Branch.

[fol. 38] Notice: It is not necessary for the insured or the beneficiary to employ the agency of any person in collecting the insurance under this Policy, or in receiving any of its benefits. Time and expense will be saved by writing direct to the Home Office, 346 Broadway, New York City. Insurance payable at death. Premiums payable during life unless dividends applied to shorten premium paying period. Disability Benefits. Double Indemnity for fatal accident. Annual Participation in Surplus.

[File endorsement omitted.]

IN CIRCUIT COURT OF HARRISON COUNTY

SUMMONS AND RETURN

THE STATE OF MISSISSIPPI,
Harrison County:

To the Sheriff of Hinds County—Greeting:

This is to command you to summon New York Life Insurance Company, a Corporation, defendant, to appear before the Circuit Court of Harrison County, Mississippi, at the Court House thereof in the City of Gulfport, in said county and State, on the First Monday of December, A. D. 1933, to answer the suit of Roy T. Mobley, plaintiff, in an [fol. 39] action of debt for total sum of $33,980.00 (on policy No. 10 340 538); and have this summons there then.

Witness my hand and official seal, this the 24th day of July, A. D. 1933.

A. J. Ramsay, Clerk of said Circuit Court, by E. G. Lindsey, D. C. (Seal.) Mize, Thompson & Mize, Attorney- for Plaintiff.

I have this day executed the within writ personally on the within named defendant New York Life Insurance Company, a corporation, by delivering a true copy of said writ to Geo. D. Riley, Insurance Commissioner for the State of Mississippi and Attorney for process for the said non-resident defendant, this the 27 day of July, 1933.

Warren Ferguson, Sheriff, by S. D. Donnell, D. S.

No. 9617. Circuit Court Harrison County. Roy T. Mobley vs. New York Life Insurance Company. Summons. To be served upon Insurance Commissioner of State of Mississippi. Term, December, 1933.

IN CIRCUIT COURT OF HARRISON COUNTY

CERTIFICATE OF MAILING COPY OF SUMMONS OR PROCESS—
Filed July 24, 1933

THE STATE OF MISSISSIPPI,
Harrison County:

I, A. J. Ramsay, Clerk of the Circuit Court of said county and State, hereby certify that I have on this the 24th day of

[fol. 40] July, 1933, mailed as required by law, a true copy of the Original Summons or process issued in Cause No. 9617, styled Roy T. Mobley vs. New York Life Insurance Company, addressed to defendant as follows: New York Life Insurance Company, 346 Broadway, New York City, N. Y.

Given under my hand and official seal of office this the 26th day of July, 1933.

A. J. Ramsay, Clerk Circuit Court, Harrison County, Mississippi. (Seal.)

(Registry Receipt U. S. Post Office, Gulfport, Mississippi, attached to said certificate.)

[File endorsement omitted.]

In Circuit Court of Harrison County

Acknowledgment of Service by Insurance Commissioner—Filed July 29, 1933

Insurance Department, State of Mississippi

Geo. D. Riley, Commissioner

Jackson, July 27, 1933.

New York Life Ins. Co., New York, N. Y.

In re Roy T. Mobley vs. Yourselves, in Circuit Court of Harrison County, Gulfport, Mississippi

Gentlemen:

Under registered cover, I hand you herein copy of summons served on me in the above styled case, which is re- [fol. 41] turnable to the Court named therein on the 1st Monday. December 1933.

Kindly acknowledge receipt of this letter.

Yours very truly, Geo. D. Riley, Insurance Commissioner.

Enc.: Register.

CC: A. J. Ramsay, Circuit Clerk, Gulfport, Miss.

[File endorsement omitted.]

IN CIRCUIT COURT OF HARRISON COUNTY

No. 9617

[Title omitted]

PETITION OF DEFENDANT FOR REMOVAL TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DIVISION OF THE SOUTHERN DISTRICT OF MISSISSIPPI, AT BILOXI—Filed Nov. 1, 1933

Comes the New York Life Insurance Company, defendant in the above entitled cause, a corporation organized under the laws of the State of New York, and domiciled and hav- [fol. 42] ing its residence in the City of New York in said State, and shows unto the Court:

(1) That at the time the suit was filed in the above entitled cause, and at all times prior thereto, now, and at all times since said date, this defendant was, has been and is now a citizen and actual resident of the State of New York, having its domicile in the City of New York in said State, from which it has never migrated, but is now, and always has been, since its incorporation, a citizen and actual resident of the State of New York.

(2) That the suit of the plaintiff herein is one of a civil nature, whereof the District Court of the United States for the Southern Division of the Southern District of Mississippi, at Biloxi, had, at the time of the filing of the declaration herein, and now has, original jurisdiction; that said suit is now pending in the Circuit Court of Harrison County, Mississippi, the style of said suit being Roy T. Mobley, Plaintiff, vs. New York Life Insurance Company, Defendant, and being Cause No. 9617 on the docket of the Circuit Court of Harrison County, Mississippi.

(3) Petitioner shows unto the Court that said suit is a controversy wholly between citizens of different states; that the plaintiff is and was at the time of the filing of said suit, a citizen and actual resident of the State of Mississippi, and the defendant is now, and was at the time this suit was filed, and at all times before and since has been a corporation organized under the laws of the State of New York, and that said suit is a controversy which can be fully determined as between the plaintiff and this defendant.

(4) The petitioner shows unto the Court that the amount involved in such suit, exclusive of interest and costs, ex-

[fol. 43] ceeds the sum of Three Thousand Dollars ($3,000.00), in that plaintiff, in his declaration, demands that judgment be rendered in his favor against this petitioner in the sum of $33,980.00.

(5) The petitioner further shows unto the Court that this petition is filed in point of time before the petitioner is required by the laws of the State of Mississippi, or the rules of this Court, to plead, answer or demur to the declaration filed against petitioner herein.

(6) The petitioner further shows unto the Court that it has given to the plaintiff written notice of this petition and bond hereto attached for the removal of this cause prior to the filing of the same, as required by law, and that a copy of said notice and bond, with proof of service therein, is hereto attached.

(7) The petitioner further shows unto the Court that it tenders herewith a bond, with good and sufficient surety, conditioned according to the statutes of the United States and in reference thereto.

(8) Petitioner prays that this petition, with bond and proof of notice, be received and filed; that this Court will proceed no further herein except to make an order of removal, and to accept the said bond and surety, and to cause the record herein to be removed to the District Court of the United States for the Southern Division of the Southern District of Mississippi at Biloxi.

New York Life Insurance Company, by Wm. H. Watkins, Attorneys.

[fol. 44] *Duly sworn to by Wm. H. Watkins. Jurat omitted in printing.*

In Circuit Court of Harrison County

No. 9617

[Title omitted]

In re Petition to Remove Cause to the District Court of the United States for the Southern Division of the Southern District of Mississippi, at Biloxi

NOTICE OF PETITION FOR REMOVAL—Filed Nov. 1, 1933

The plaintiff and his attorneys of record in the above-styled cause are hereby given notice that the defendant,

the New York Life Insurance Company, will, on or before the first Monday in December, 1933, file in the above-en- [fols. 45 & 46] titled cause, pending in the Circuit Court of Harrison County, Mississippi, a petition, duly verified, accompanied by bond, with good and sufficient surety, as provided by law, for the removal of said suit from the Circuit Court of Harrison County, Mississippi, to the District Court of the United States for the Southern Division of the Southern District of Mississippi, at Biloxi; and, as soon thereafter as convenient to Court and counsel, will present said petition to the Judge of said Court at the county Court House in Gulfport, Harrison County, Mississippi.

New York Life Insurance Company, by Wm. H. Watkins, Attorneys.

Service acknowledged by copy.

Mize, Thompson & Mize, Attorneys for the Plaintiff.

Bond on removal for $500.00, approved and filed Nov. 1, 1933, omitted in printing.

[fol. 47] [File endorsement omitted]

IN CIRCUIT COURT OF HARRISON COUNTY

No. 9617

[Title omitted]

ORDER OF REMOVAL TO U. S. COURT—Filed Nov. 1, 1933

This cause came on to be heard on the application of the defendant, the New York Life Insurance Company, to remove said cause to the District Court of the United States for the Southern Division of the Southern District of Mississippi, at Biloxi; and the Court having considered the same, doth order and adjudge that the petition be granted, and the Clerk of this Court is directed, as required by law, to transmit the record to said Court.

Oct. 31, 1933.

W. A. White, Circuit Judge.

O. K. S. C. Mize.

[File endorsement omitted:]

[fol. 48] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 49] IN CIRCUIT COURT OF HARRISON COUNTY

Law No. 1001

No. 9688

ROY T. MOBLEY, Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, Defendant

DECLARATION—Filed Nov. 1, 1933

Plaintiff, Roy T. Mobley, would respectfully show unto the Court the following facts, to-wit:

That he is a resident citizen of the State of Mississippi.

That the defendant, New York Life Insurance Company, is a corporation duly organized and existing under the laws of the State of New York, and is a citizen of the State of New York, with its home office at No. 346 Broadway, New York, New York.

Plaintiff avers that said defendant, New York Life Insurance Company, is engaged in the business of writing life insurance for remuneration, and on the 9th day of April, 1925, issued its policy of insurance upon the life of plaintiff herein in the sum of two thousand dollars, with the further agreement that the company agreed to pay the said insured the sum of twenty dollars each month and waive payment of premiums as provided in said policy, upon plaintiffs paying to the said defendant the sum of $25.04 [fol. 50] semi-annually for the disability benefits that were provided in said policy.

That it thereupon became and was the duty of the defendant company to carry out the agreements stipulated in said policy, the original of which said policy is hereto attached, marked Exhibit "A".

Plaintiff avers that said policy provided that whenever the insured is disabled by bodily injury or disease that he is wholly prevented from performing any work, from following any occupation, or engaging in any business for remuneration or profit, and upon receipt of proof by the

company that the insured is totally disabled as above defined and will be continuously disabled for life, that the said company would waive premiums and would pay the sum of ten dollars per thousand upon the face of the policy, monthly.

Plaintiff avers that he became totally and permanently disabled after the issuance of said policy and while it was still in full force and effect, and furnished proof to the said company that he was totally and permanently disabled and said company waived premiums for several months and paid him disability payments at the rate of twenty dollars per month including up and until January 13th, 1933, but on said date, to-wit, January 13th, 1933, the defendant wilfully and wrongfully declined to make any further payments because of the total and permanent disability and notified plaintiff on March 1st, 1933, that it would not make any further payments under said policy and wholly breached its policy on said date.

Plaintiff avers that on March 9th, 1933, plaintiff, through the attorney authorized to represent him, made demand upon said defendant company for the total sum of $9,600.00 [fol. 51] being the cash value of the life expectancy of the said insured that he was entitled to recover under said policy, and another policy he held with said company and on March 16, 1933, said defendant company, by letter addressed to the attorneys for the plaintiff, advised plaintiff that they would review the file, and on March 17th, 1933, said defendant company, by letter addressed to the attorneys for the plaintiff, declined to make said payment or to make any further disability payments and completely breached said contract.

Plaintiff avers that he is now, and has been for many months prior to March 1st, 1933, totally and permanently disabled by bodily injury and disease, having become so disabled while said policy was still in full force and effect, and that plaintiff has made application to the defendant company for all disability benefits provided in his policy and furnished due proof that he was totally and permanently disabled, and said company has declined, as aforesaid, to pay said disability benefits monthly as they fell due under the policy, but on March 1st, 1933, as aforesaid, wholly breached its contract, and that the said defendant has made no payments in any amount whatever since the January 1933 payment, heretofore alleged.

Plaintiff avers that the defendant has wholly failed, neglected and refused to pay for him the premium which became due on Feb. 2, 1933, as it was required to do under said policy.

Plaintiff avers that the defendant has totally breached, rejected and repudiated its said contract of insurance with the plaintiff, and all without just cause.

[fol. 52] Plaintiff avers that he is now 33 years of age and has a life expectancy of 40 years. That during the remainder of his life he will continue to be totally disabled and prevented from performing any work for compensation or profit or from following any gainful occupation whatsoever. That the sum of twenty dollars per month for a period of 40 years amounts to the sum of $9,600.00.

Plaintiff avers that because he is now totally and permanently disabled, he is not an insurance risk and is not able to take out a policy of insurance payable in a lump sum upon his death.

Plaintiff avers that by reason of the breach, rejection and repudiation of the aforesaid policy, No. 7,802,419, by the said defendant, plaintiff is entitled to recover, in addition to the monthly benefits, the value of the policy of two thousand dollars.

Wherefore, plaintiff sues and demands judgment against said defendant company in the sum of $11,600.00.

Roy T. Mobley, Plaintiff. Mize, Thompson & Mize, Attorneys.

[File endorsement omitted.]

Exhibit omitted by consent.

[fol. 53] In United States District Court for the Southern Division of the Southern District of Mississippi

No. 1001

Roy T. Mobley

vs.

New York Life Insurance Company

Defendant's First Special Plea

Comes the New York Life Insurance Company, defendant in the above entitled cause, by its attorneys, and for a

plea to the plaintiff's declaration exhibited against it in the above entitled cause, says that the plaintiff should not have and recover of and from the defendant by reason of any of the matters and things alleged in the plaintiff's declaration, for that upon the 7th day of August, 1928, the defendant executed and delivered to the plaintiff, Roy T. Mobley, its policy of insurance made Exhibit "A" to the plaintiff's declaration, said policy being number 10,340,538; that said policy provides, as appears therefrom, conditioned upon the payment by the plaintiff of insurance premiums provided therein, or the assumption thereof by the defendant upon receiving at its home office in New York City, New York, due proof of the assured's death, that the defendant shall pay to plaintiff's estate the sum of $5,000.00; that, in addition thereto, the defendant bound and obligated itself to pay the plaintiff fifty dollars per month for each completed month if and when the insured became so disabled by bodily injury or disease that he is wholly prevented from performing any work, from following any occupation, or from engaging in any business for remuneration or profit, provided such disability occur after the policy in question take effect and before the anniversary of the insured's sixtieth birthday, and further provided that the insured, before default in payment of premium, should give the defendant due proof of such total [fol. 54] disability. The policy further provided that if the proof submitted was not conclusive as to the permanency of such disability but established that the assured, for a period of not less than three consecutive months immediately prior to receipt of proof was totally disabled, the company would pay the disability claim hereinbefore set out and would waive the payment of any premium falling due during the period of such continuous total disability.

The defendant shows unto the Court that prior to the 13th day of February, 1931, the plaintiff submitted to the defendant proof from which it appeared and the defendant believed that for a period of not less than three consecutive months immediately preceding receipt of such proof, the plaintiff was totally disabled, as defined in said policy, whereupon as of January 13, 1931, payable February 13, 1931, the defendant approved the plaintiff's disability claim for $50.00 per month and made a written

waiver of the payment of any premium falling due during the period of continuous total disability. That the defendant continued to pay to the plaintiff $50.00 per month monthly thereafter in accordance with the terms of said policy up to and including the monthly payment due January 13, 1933, and during such period waived the payment of all premiums falling due during said period.

That immediately following the 13th day of January, 1933, the defendant received information which it believed to be true and from which it appeared that plaintiff was not totally disabled as defined in said policy; that by reason of such information and the defendant's belief in respect thereto as aforesaid, the defendant did not pay to the plaintiff the disability benefit of $50 otherwise payable of such total disability continued upon the 13th day of February, 1933, but that, upon the other hand, upon [fol. 55] the first day of March, 1933, the defendant wrote to the plaintiff as follows:

"Mar. 1, 1933.

"Mr. Roy T. Mobley, Jackson, Miss.

Re Claim No. 64,138-B, Pol. No. 10340538, etc.

"DEAR SIR:

"Referring to the above numbered policies, upon which monthly disability income payments have been made up to and including January 13, 1933, inclusive, it appears that for some time past you have not been continuously totally disabled within the meaning of the Disability Benefit Provisions contained in the policies.

"In view of this condition, we regret to inform you that no further monthly disability income payments will be made and the premiums due on and after February 7, 1933, become payable in conformity with the terms of the contract.

"Very truly yours, —— ——, Chairman. HT:W."

Upon March 9th, 1933, the plaintiff's attorneys, Mize, Thompson & Mize, of Gulfport, Mississippi, replied to the defendant's letter of March 1st, as follows:

"March 9th, 1933.

New York Life Insurance Company, 51 Madison Avenue, New York, New York.

Re Your Policies No. 7802419 and No. 10340538—Roy T. Mobley, Insured

"GENTLEMEN:

"This is to advise you that we have been employed by Mr. Roy T. Mobley in regard to the foregoing claims which [fol. 56] have arisen under the above policies and we contemplate taking immediate legal action unless this matter is satisfactorily settled within the next seven days.

"We have in our possession your letter of March 1st, 1933, addressed to Mr. Mobley, in which you deny that he is totally disabled and that you deny any further liability under said policies by virtue of total and permanent disability and that premiums will be due on and after February 7th, 1933.

"This is to put you on notice that Mr. Mobley is now totally and permanently disabled and will continue to be so throughout the remainder of his natural life and he refuses to make any payments of premiums on either policy for the reason that you are indebted to him, and for the further reason under the terms of your contract as long as he is disabled there is a waiver of his premium.

"This is further to advise you that since you have breached your contract we now call on you to pay said policies in full for the remainder of his natural expectancy, which is thirty-four years and six months from this date which under the terms of said policies will amount to $28,980.00. We therefore make demand for the payment in full of this claim and will immediately file suit unless the matter is adjusted in the next seven days.

Yours very truly, R. W. Thompson, Jr. RWT:MS."

[fol. 57] To which letter the defendant replied as follows:

(Air Mail)

"March 16, 1933.

Re Roy T. Mobley Claim No. 64,183-B, Pols. No. 10,340,538-7,802,419

"Mr. R. W. Thompson, Jr., Attorney-at-law, 400-408 Hewes' Bldg., Gulfport, Mississippi.

"DEAR SIR:

"Your letter of March 9, 1933, in regard to the claim of the above named Insured has been received and the contents of the same has been carefully noted.

"We will accordingly review our file on the case and write to you fully, in the course of the next day or two.

Very truly yours, —— ——, Chairman. KB:ERC."

Again on March 17, 1933, the defendant wrote R. W. Thompson, one of plaintiff's counsel, as follows:

"March 17, 1933. KB:FB."

"Mr. R. W. Thompson, Attorney-at-law, Mize, Thompson & Mize, 400-408 Hewes Bldg., Gulfport, Miss.

Re Roy T. Mobley Pol. No. 10,540,538, etc., Claim No. 64,183-B

"DEAR SIR:

"Referring further to your letter dated March 9, 1933, [fol. 58] concerning the claim of the above named Insured, we wish to advise that when the Company had under consideration the question of continuing the payment of benefits on the claim after the monthly payment made as of January 13, 1933, information obtained as the result of our customary investigation indicated that the insured has been able to be up and about every day and to all appearances sufficiently recovered to permit him to resume the performance of some remunerative work. Furthermore, the Company's medical examiner in his report of the examination made January 26, 1933, advised that in his opinion the insured is capable of performing some light work of a remuneratve nature.

"Under the circumstances, since the policies provide, that the payment of disability benefits is subject to the continuance of total disability preventing the insured from performing any work or engaging in any occupation whatsoever for remuneration or profit, the Company in view of these reports could not consider the insured was any longer totally disabled as defined and discontinued the payment of benefits, to which decision we must adhere.

Yours very truly, —— ——, Chairman."

Upon June 5, 1933, the defendant wrote to the plaintiff as follows:

"New York Life Insurance Company,

51 Madison Avenue, Madison Square,
New York, N. Y.

Actuarial Department

Arthur Hunter, Vice-President and Chief Actuary,
William Macfarlane, Second Vice-President and Actuary.
[fol. 59] Davis L. S. Douglas, Actuary,
William V. Herbert, Assistant Actuary,
Walter G. Bowerman, Assistant Actuary,
James T. Phillips, Assistant Actuary.

June 5, 1933.

Mr. Roy T. Mobley, Lucedale, Mississippi.

Dear Sir:

Policy No. 10,340,538.
Due date of premium which remains unpaid, 2-7-33.
Insurance automatically continued until 6-20-37.
Amount of continued insurance, $5,000.00.

Application for reinstatement, after default in payment of premium, specified above, not having been made, notice is hereby given that pursuant to the terms of the policy the value of the policy has been applied to purchase continued insurance as stated above.

Very truly yours, Arthur Hunter, Vice-President."

Upon July 8, 1933, plaintiff's counsel wrote to the defendant the following letter:

"Gulfport, Mississippi, July 8th, 1933.

"New York Life Insurance Company, 51 Madison Avenue —Madison Square, New York City.

"In re Policy No. 10340538—Roy T. Mobley—Claim No. 64183-B

"Gentlemen:

"Your letter of June 5th to Mr. Mobley at Lucedale, Mis-
[fol. 60] sissippi, advising that you had applied the value

of the policy to purchase continued insurance, was turned over by him to us for reply.

"In reply thereto will state that we wrote you on March 9th, 1933, that Mr. Mobley was totally and permanently disabled and made demands upon you at that time for the value of the benefits provided by said policy, and you are therefore not authorized to apply the value to purchase continued insurance, and Mr. Mobley does not agree to said application.

"We expect to file suit on this matter within the next few days.

"Very truly yours, Mize, Thompson & Mize, by S. C. Mize. SCM:MD."

On July 12th, 1933, defendant wrote plaintiff's counsel as follows:

"July 12, 1933. HT:FB.

"Mr. S. C. Mize, Mize, Thompson & Mize, Attorneys at Law, 400-408 Hewes Bldg., Gulfport, Miss.

Re Roy T. Mobley, Pol. No. 10,340,538, Claim No. 64,183-B

"Dear Sir:

"We have received your letter of July 8, 1933, and are willing to give further consideration to the question of the above named Insured's claim for disability benefits. In that regard, will you please furnish us with a statement completed by the Insured's attending physician describing his condition since the early part of January, 1933.

[fol. 61] "In order that the matter may receive prompt attention we are requesting one of our physicians to call upon the Insured for the purpose of a medical examination and he may expect to hear from the doctor in that regard very shortly.

"Yours very truly, —— ——, Chairman."

The defendant alleges and avers that all of its communications with the plaintiff or his counsel were in writing and the foregoing letters constitute the entire correspondence between the plaintiff, his counsel and the defendant in respect to the failure of the defendant to pay to the plaintiff the disability claim asserted by the plaintiff under the policy sued on payable February 13, 1933. That the de-

fendant did not in said letters or either of them repudiate plaintiff's contract but merely in good faith, based upon information which it deemed to be reliable, informed the plaintiff that the conditions entitling him to have and receive from the defendant further monthly disability payments were not present in that he was not at that time totally disabled within the meaning of the policy. The defendant alleges and avers, however, that at all times it kept an open mind upon the situation, and following its letter to the plaintiff of July 12, 1933, it had one of its local physicians call upon the plaintiff and re-examine him; that the plaintiff submitted to such re-examination which took place July 24, 1933—the very date upon which this suit was filed; that in due course plaintiff received the report of the physician, and with reasonable despatch considered the same, with the result that on or prior to August 9, 1933, defendant determined as a result of such examination that probably the plaintiff continued to be totally disabled within the meaning of said policy, and accordingly, without delay, [fol. 62] upon August 9, 1933, it executed, issued and mailed the defendant's counsel a waiver of premium statement, the same being in words and figures as follows, towit:

"No. 189977

Waiver of Premium Statement

"New York life Insurance Company

51 Madison Avenue, Madison Square

"New York, August 9th, 1933.

"To the Holder of Policy No. 10,340,538, R. Mobley:

"On account of disability of the insured under the above-numbered policy, the New York Life Insurance Company hereby waives payment of the semiannual premium of $66.35 ea. on said policy falling due on the 7th day of Feb. & Aug. 1933 but without waiving or otherwise changing any of the terms or conditions of said policy.

"This statement shall have no force or effect unless it is countersigned by the Registrar of the Company.

"Thomas A. Buckner, President. Countersigned by J. W. Behan, Registrar.

Accompanying said waiver or premium statement it mailed to the defendant's counsel its draft on the Chemical Bank and Trust Company, New York City, New York, in the sum of $300.00 covering disability payments under the policy sued on from February 13, 1933, to July 13, 1933, which waiver of premium statement and draft defendant's counsel unconditionally tendered to plaintiff and his counsel, which tender was refused by plaintiff and his counsel solely on the ground that the defendant was indebted to the plaintiff in the manner and form alleged in the plaintiff's declaration; [fol. 63] that the defendant immediately following the 13th day of each month thereafter has tendered to plaintiff and his counsel the full sum of $50.00 per month covering disability income on the policy sued on up to and including the disability income accruing Oct. 13, 1933, and is willing to continue and offers to continue such disability payments so long as the plaintiff continues permanently disabled as defined in said policy. That it now tenders into Court with its plea disability income under said policy at the rate of $50.00 per month from February 13, 1933, to October 13, 1933, inclusive, together with the costs of Court accrued to this date, and will continue to make such tender into Court so long as such total disability continues.

All of which the defendant is ready to verify.

Watkins & Eager, Attorneys for Defendant.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

[Title omitted]

DEFENDANT'S PLEAS—Filed Nov. 21, 1933.

Comes the New York Life Insurance Company, defendant, by its attorneys, and for a plea to the plaintiff's declaration exhibited against it in the above entitled cause, says [fol. 64] that it is not indebted to the plaintiff in the manner and form alleged in said declaration, and of this, it puts itself upon the country.

Watkins & Eager, Attorneys for the Defendant.

Comes the New York Life Insurance Company, defendant, by its attorneys, and for a further plea to the plaintiff's declaration exhibited against it in the above-entitled cause, says that it did not undertake and contract in the manner and form alleged in said declaration, and of this, it puts itself upon the country.

Watkins & Eager, Attorneys for the Defendant.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

No. 1001

[Title omitted]

DEFENDANT'S PLEAS—Filed Nov. 24, 1933

Comes the New York Life Insurance Company, defendant, by its attorneys, and for a plea to the plaintiff's declaration exhibited against it in the above-entitled cause, says that it is not indebted to the plaintiff in the manner and form alleged in said declaration, and of this it puts itself upon the country.

Watkins & Eager, Attorneys for the Defendant.

Comes the New York Life Insurance Company, defendant, by it attorneys, and for a further plea to the plaintiff's declaration exhibited against it in the above-
[fol. 65] entitled cause, says that it did not undertake and contract in the manner and form alleged in said declaration, and of this, it puts itself upon the country.

Watkins & Eager, Attorneys for the Defendant.

NOTICE UNDER THE GENERAL ISSUE

The plaintiff and his attorneys of record will take notice that at the trial of the above-entitled cause, the defendant will offer evidence to prove, and will prove, that it did not pay the disability claim otherwise payable on the policy sued upon, maturing February 13, 1931, for that, it had

reason to believe that the plaintiff was not at that time totally and permanently disabled within the meaning of the policy sued upon. That, however, upon July 12, 1933, it asked one of its local physicians to re-examine plaintiff, which examination took place July 24, 1933. That in due course, defendant received the report of such physician, and with reasonable dispatch, considered the same, with the result that on and prior to August 9, 1933, defendant determined, as a result of such examination, that probably the plaintiff continued to be totally disabled within the meaning of said policy, and, accordingly, without delay, upon August 9, 1933, it issued and provided the plaintiff with a waiver of premium statement. Accompanying said waiver of premium statement, it tendered to the plaintiff payment of all disability claim under said policy accruing up to August 15th, 1933, which plaintiff refused to accept. That since said date, it has continued to tender to plaintiff disability benefits payment under such policy up to and including the payment accruing October 13, 1933, and is willing to continue and offers to continue such disability payments so long as the plaintiff continues disabled as defined [fol. 66] in said policy, and it now tenders into Court with its plea disability income under said policy at the rate of $20.00 per month from February 13, 1933, to October 13, 1933, inclusive, together with the cost of the Court accrued to this date, and will continue to make such tender into Court so long as such total disability continues.

Watkins & Eager, Attorneys for the Defendant.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

No. 998. At Law

ROY T. MOBLEY

v.

NEW YORK LIFE INSURANCE COMPANY

No. 1001. At Law

ROY T. MOBLEY

v.

NEW YORK LIFE INSURANCE COMPANY

ORDER CONSOLIDATING CASES—Filed Feb. 22, 1934

For the purposes of trial, it is ordered and adjudged that the two above styled causes be and they are hereby consolidated for purposes of trial, but separate verdicts and judgments however to be entered in each case.

This February 22, 1934.

E. R. Holmes, District Judge.

[fol. 67] IN UNITED STATES DISTRICT COURT

No. 998

[Title omitted]

REPLICATION TO SPECIAL PLEA

Comes Roy T. Mobley, plaintiff, and for replication to the defendant's special plea denies that he is not entitled to recover of and from the defendant the amount sued for in the declaration.

He admits that on the 7th of August, 1928, the defendant delivered to him its policy of insurance $10,340,538 and admits that the defendant bound itself to pay him $50.00 per month when he became disabled by bodily injury or disease to the extent that he was prevented from performing any work or following any occupation or from engaging in business for remuneration or profit as set out in the policy.

He admits that prior to the 13th of February, 1931, he submitted to the defendant proof that for a period of not less than three consecutive months immediately preceding receipt of such proof he was totally disabled as defined in the policy and admits that on January 13th, 1931, for $50.00 per month and made a written waiver of the payment of the premium next falling due but denies that the defendant continued to pay the plaintiff $50.00 per month monthly thereafter in accordance with the terms of said policy up to and including the monthly payment due January 13th, 1933, but avers that the defendant finally paid an amount equal to the monthly payments up to Jan. 13, 1933, but only after plaintiff had placed his claims in the hands of attorneys and [fol. 68] after a delay of some times from three to four months, and after repeated demands by the plaintiff for the payment as will be shown by correspondence hereinafter to be referred to.

He denies that immediately after the 13th of January, 1931, the defendant received information which it believed to be true and from which it appeared that plaintiff was not totally disabled as defined in the policy and denies that by reason of such information and the defendant's belief in regard thereto, it refused to pay the monthly disability benefit of $50.00 per month but admits that it did refuse to pay it and avers that said refusal was wilful and constituted a breach of the contract as will be hereinafter set out.

He admits the correspondence set out in the special plea transpired. He denies that the letters set out in the special plea constitute all the correspondence between the plaintiff, his counsel and the defendant in regard to the failure of the defendant to pay to the plaintiff the disability claims asserted by the plaintiff under the policy, and avers that the defendant prior to the 13th of February, 1933, and as far back as 1931 refused to waive premiums and refused to pay the claims although the plaintiff was totally disabled as they fell due, but required the plaintiff in 1931 to employ a lawyer in order to procure the payment of his claims that were due and required him to pay some of the premiums which he did under protest and which were afterwards refunded, and finally absolutely declined to waive the premium that was due on the 7th of February, 1933, and notified the plaintiff on April 13th, 1933, that his policy had lapsed and sent him a notice to that effect with an applica-

tion requesting him to sign to re-instate his policy, said correspondence is hereto attached marked as Exhibit 1 to 33 and made a part hereof as fully as if copied herein.

[fol. 69] Plaintiff denies that the defendant did not repudiate plaintiff's contract and denies it in good faith based on any information which it deemed to be reliable merely informed the plaintiff that the conditions entitling him to have and receive from the defendant monthly payments were not present in that he was not at that time totally disabled within the meaning of the policy and denies that the defendant was acting in good faih.

He denies that the defendant at all times kept an open mind on the situation as is shown by exhibits — hereinbefore referred to and avers that said defendant totally breached its contract and wilfully breached it at a time when it knew that the plaintiff was totally and permanently and forever disabled, and as shown by letters dated March 1st, 1933, and March 17th, 1933, set out in defendant's special plea.

He admits that after it had breached its contract it had a physician examine him but this was after the plaintiff had made repeated demands on the defendant for the payment of disability benefits and after it had arbitrarily and finally declined to do so and after it had again shown its position in its letter to plaintiff's attorney.

He denies that with reasonable dispatch the defendant considered his claim but admits that on August 9th, 1933, the defendant, after it had breached its contract as aforesaid sent to the plaintiff a waiver of the premium which of course the policy already provided for and he admits that the defendant tendered him the sum of $300.00 but avers that this was not the amount he was suing for and that he declined to accept same on the grounds that the defendant is indebted to him in the manner and form alleged in his declaration.

[fol. 70] He admits that the defendant has tendered him $50.00 per month since said date which he has declined to accept on the ground that the defendant has breached its contract and plaintiff is entitled to recover the full amount sued for in his declaration.

Plaintiff avers that from the inception of this claim the defendant has repeatedly breached its contract as shown by the exhibits attached to this replicatio[illegible] That prior to

the 7th of February, 1932, it sent plaintiff a demand for payment of the premium which thereafter it finally refunded to the plaintiff. That prior to the 7th of February, 1933, it sent him another notice and demand for payment of the premium and after the 7th of February, 1933, sent him still another notice that grace expired on March 10th, 1933, and that finally on the 13th of April, 1933, after it had reviewed all of its files and after it had received the notice from the attorneys that they had been employed to represent the plaintiff, it wrote him that the policy had lapsed for non-payment of premium as shown by Exhibit No. 33 to the replication.

Plaintiff avers that during all of said time he was totally and permanently disabled and had furnished to the defendant proof of such at such times and in such manner as required by the defendant, and all of the foregoing facts the plaintiff puts himself on the country.

Mize, Thompson & Mize, Attorneys for Plaintiff.

Exhibits to Replication

EXHIBIT No. 1

April, 29th, 1931.

Mr. Roy T. Mobley, Lucedale, Miss.

Re Policy Nos. 7,802,419—10,340,538—Mobley

DEAR SIR:

I am enclosing two letters just received by me from the Branch office, also check for $25.04 and two waiver of pre-
[fol. 71] mium receipts. Please return the receipts to me that were given you at the time the premium refunded was paid also the one sent you when the lien note was executed, as there are to be replaced by the waiver of premium receipts.

The check covering the monthly installments will be received in the next few days from the Home Office at which time I will mail to you promptly.

The statement No. 4 called for is to be executed by the present attending physician, so that the company may de-

termine whether or not to continue the monthly payments, after the first check is sent to you.

If I can be of any further service to you, please command me.

Sincerely yours, W. Y. Guilbert, Special Agent.
WYG.

"Life Insurance is a Service, Not a Commodity."

EXHIBIT No. 2

May 3rd, 1931.

Mr. R. T. Mobley, Lucedale, Miss.

Re Pol. Nos. 7,802,419—10,340,538

DEAR MR. MOBLEY:

Received your letter of the 30th enclosing receipts. The note will be marked canceled and the dividend will be credited back to the policy, and can either be left with the Company, or withdrawn by you in cash, should you wish to do so.

I have just received check for $80.00 covering four months, under Number 7,802,419, and check for $200.00 covering the same period on Policy No. 10,340,538. The checks are enclosed with letter from the Company stating the period covered.

If you wish to do so, I would appreciate a letter from you giving your impression of the treatment given you [fol. 72] by the New York Life and just how much importance you feel is attached to the Disability Clauses in life insurance policies. We use these letters in pointing out the importance of this kind of protection to others and a concrete case is more impressive than simply an imaginary one. I have letters from Dr. Felix J. Underwood, Dr. Van Alstine and Mr. W. G. Plummer of this city, all of whom have drawn disability. If you would hesitate to do this, feel that I will not think it amiss for you to state as unless you would be willing to have a letter used we would not wish to cause you any embarrassment in the matter.

Haven't received the statement from Dr. Currie as yet, but suppose it will come along in a few days. The monthly

payments will be made on the 13th of each month, for each completed month, as long as your disability lasts. So after all the 13th isn't such a bad day.

Read my motto on the bottom of the letterhead and if there is any service that I can render you just put me to the test. You are not working any hardship on me in securing any service that I can render—that is after all what Life Insurance is.

With best wishes, I am

Sincerely yours, W. Y. Guilbert, Special Agent.
WYG.

"Life Insurance is a Service not a Commodity."

EXHIBIT No. 3

July 6, 1931.

Mr. Roy T. Mobley, Lucedale, Mississippi.

Re Policy: 7,802,419, 10,340,538, Claim No. 64,183-B

DEAR SIR:

Referring to the above numbered policies, on your life, on which policies monthly disability income payments have [fol. 73] been made to June 13, 1931, inclusive, the Company has given your case most careful consideration, and we regret to have to advise you that we do not feel justified in allowing further benefits, inasmuch as it does not appear that you are any longer continuously totally disabled within the meaning of the Disability Benefit Provision contained in the policies.

In view of the circumstances, no further disability income payments will be made and the premiums due on and after July 2, 1931, have become payable in conformity with the terms of the contracts.

Yours truly, F. S. Lantry, Chairman.

EXHIBIT No. 4

Lucedale, Mississippi, July 11, 1931.

Mr. W. Y. Guilbert, c/o New York Life Ins. Co., Branch Office, Tower Building, Jackson, Mississippi.

DEAR MR. GUILBERT:

I have just received notice from the company that they were discontinuing payment of monthly benefits, and that no further premiums would be waived. This was not altogether a surprise to me as I discovered some time ago that their confidential reports were obtained through parties who knew nothing about my actual condition and made no effort to find out the facts.

I am as much disabled now as I have been at any time since I got up from the operation, and am therefore instructing my attorney, Mr. Barnett, of Jackson, to file suit against the company immediately.

[fol. 74] I have not been satisfied with the suspicious attitude in which the Company has dealt with my case, and its arbitrary action is cutting off my insurance, makes me feel justified in asking that you return my letter to you in which I set out the benefits of this insurance to me.

I do not care to recommend a Company which obtains its information in such a manner that a disabled policy holder must go about complaining about his disabilities to every Tom, Dick and Harry under the fear that otherwise he might be overheard by some spy of the Company, and have his efforts to keep himself in a healthy state of mind turned against him.

I am ready to return to work as soon as I feel able to do so, and in fact have made several attempts to work. I am also ready to return to work when my physicians advise me that it is safe for me to do so.

I fully appreciate your personal service to me in this matter, and upon return of my former letter, if it will benefit you, I will write you another acknowledging your valuable service and the benefit the insurance received had been to me, but without recommending the Company.

Very truly yours, —— ——.

EXHIBIT No. 5

Lucedale, Mississippi, July 14, 1931.

Mr. W. Y. Guilbert, Special Ag't, New York Life Ins. Co.,
Branch Office, Tower Building, Jackson, Mississippi.

DEAR MR. GUILBERT:

I did not ask you to help me in straightening out my insurance because I thought I had imposed upon you about as much as one policy-holder should. I shall, of course, [fol. 75] be glad to have you assist me, and will ask my attorney to withhold the suit until I hear further from you.

I expected Dr. Shands' malicious report to give me some trouble in securing my insurance. But once having settled the matter, I did not think the company would continue to deal with me in an attitude of suspicion, and jump at the first apparent excuse to discontinue my benefits.

There is nothing in my past that could lead the company to suspect that I was practicing a fraud on them. I did not plan to have appendicitis, and especially not the kind that I did have. My income for the past three years has averaged, monthly, at least three times the amount of my insurance. Other lawyers are getting my clients because I cannot look after my business. I have a wife and baby to take care of. My wife and I are both graduates of the University, and am not very much impressed with the huge income of $70.00 per month. I make these statements merely to show you why I resent the company's verbally kicking me out of the house with the insinuation that I am pretending to be disabled in order to draw my insurance. I seem to have misled you in regard to the kind of work I have tried to do. I have made only one attempt to do legal work since I became sick, and that was before I applied for insurance benefits. When Dr. Shands discharged me from his care in January, he advised me that I could return to work at the end of the month. Acting on this advice I attempted to return to work early in March, assisting Judge J. Morgan Stevens in briefing a case in which we were jointly interested. This work extended over a period of four or five days, and its result was that I was practically reconfined to my bed for more than a month, and I believe is partly responsible for my present condition.

This, of course, has nothing to do with my present condition.

[fol. 76] My reference was chiefly to efforts to do physical work about the place here. Light jobs by which I could test out my capacity without overstraining myself. My legal work has been confined to securing other lawyers to take over the work of my clients. If the company has any contrary information it is erroneous.

I have numerous symptoms of infirmities which I have not reported because my physician attributes them to my general condition. I am now taking treatment for my heart *with* Dr. Currie found to have a murmur when he examined it three weeks ago. I am also taking treatment for hemorrhoids which have developed since my operation. My chief trouble is nervous instability, which naturally I do not parade before the public because I expect to be able to return to the practice of my profession sometime in the near future.

Contrary to the apparent impression of the company, I am still acting under the advice of my physician, Dr. N. R. Currie, and my personal friend, Dr. E. A. Copeland; as well as my own knowledge of my condition. When these two men tell me that it is safe for me to return to work, I shall certainly make the effort to do so.

I have not refused to make any report, or submit to any examination requested by the company. I, of course, do not know what kind of reports the company's physician turned in, but, I do know what kind of an examination of me that he made. I am also informed that two of the secret reports which the company had made on my case were made by parties who did not know me and made no serious effort to find out the truth about my case.

As I do not know what caused the company to take this action, I am at a loss to suggest any means by which it might be remedied. If it has information that I have worked, I shall be glad to submit the facts; also, if it has an adverse medical report I shall be glad to furnish proof [fol. 77] that it is erroneous. It is for the company to specify how, and in what manner the proof shall be made, as long as it is reasonable and the information given true.

My only request is that, if the company will reconsider its action, it do so immediately, I understand the method used by the company is securing its information. I have

made hundreds of such reports for the Retail Credit Company of Atlanta. I know from experience that such reports do not justify a company's cutting off payments to a disabled policyholder, arbitrarily, without giving him an opportunity to prove the information erroneous.

I know that my policy does not cover temporary disability. But, disability which has lasted for more than seven months and is still indefinite can hardly be called temporary.

Having placed this matter back in your hands, I am counting upon you to secure the earliest possible action on the part of the company.

Sincerely yours, —— ——.

——

EXHIBIT No. 6

July 16th, 1931.

Mr. R. T. Mobley, Lucedale, Miss.

DEAR MR. MOBLEY:

Have just received yours of the 14th inst., and am immediately proceeding with your case. Have just made an effort to get in touch with Dr. Currie over 'phone, but find that he is out of his office. As soon as I can get in touch with him will secure a statement from him relative to your case; submitting his statement together with your letter to the company.

[fol. 78] As I stated to you I feel that as a client of mine you are entitled to the best services that I can render you. There is only one statement in your letter that I did not like, and that was contained in the first paragraph and was to the effect that you did not wish to impose on me. Please remove from you- mind any thought that you could impose on in this matter, any more than a client of yours would be imposing on you in asking that you give his case your best thought and attention. Life insurance is a service and not a commodity and when you take a policy through me or any other life insurance agent, the attitude of the agent should be that he has been retained by you to look after all matters arising in connection with this insurance of whatsoever nature they may be. This is the way I feel about it, and I want you to feel the same way.

I will keep you informed in the matter and should the Company desire further information will advise you as to its character; apd if possible for me to secure it, without troubling you, I will do so, and then tell you that it has been done.

Let's make up our minds not to worry over this matter, but take the steps necessary as they arise. Depend on it that I will do everything possible for you in the matter.

Very kindest regards, and best wishes, I am

Sincerely yours, W. Y. Guilbert, Special Agent.

WYG.

EXHIBIT No. 7

Memo to Mr. Mobley:

I am attaching hereto a copy of letter that I am writing the Cashier, which is self-explanatory.

You can rest assured that I will give this matter the most careful attention.

Best wishes,

W. Y. G.

[fol. 79] EXHIBIT No. 8

July 23rd, 1931.

Mr. C. E. Randall, Cashier, New York Life Insurance Co.,
Jackson, Miss.

In re Disability Claim—R. T. Mobley

DEAR MR. RANDALL:

It seems that for some reason the Company has discontinued monthly payments in the above case. For the Company's information I am attaching hereto a letter from Mr. Mobley with reference to his condition, also, a letter from Dr. N. R. Currie of this city; his attending physician.

I will appreciate it if you will forward this information to the Company by airmail in order that an immediate reconsideration of the case may be had.

Yours very truly, —— ——, Special Agent. WYG.

EXHIBIT No. 9

August 3rd, 1931.

Mr. W. Y. Guilbert, Office.

Re Pol. 10,340,538—Roy T. Mobley

DEAR MR. GILBERT:

We have just received the following letter from the Home Office relative to this case:

"Referring to your letter of July 23rd, 1931, with enclosures, please advise the insured that in view of the addi-
[fol. 80] tional particulars received, the Company will be pleased to give further consideration to his claim. Under even date we are writing direct to the Company's examiner, Dr. Huggins, for a report on Form No. 5."

(Signed) F. S. Lantry, Chairman.

Yours very truly, C. E. Randall, Cashier. EMR.

P. S. We would suggest that you bring the insured and Doctor together in order that the above form may be furnished.—C. E. R.

Memo: The above is self-explanatory. If you find that it is not convenient to make a trip to Jackson, would suggest that you write me and I will secure the name of the Company's examiner at Lucedale. Best wishes.

W. Y. (Billy) Guilbert.

EXHIBIT No. 10

August 27, 1931.

Mr. Roy T. Mobley, Lucedale, Mississippi.

Re: Pol. No. 10,340,358

DEAR SIR:

Referring to our telephone conversation of this morning, I am attaching hereto lien note for the full amount of the premium which was due August 7th. I believe you stated that you wished to use the dividends in connection with this
[fol. 81] premium, and I find that you have a credit of

$61.96 which leaves a balance of only $4.39 required to cover the premium.

If you do not wish to use the dividends, the note for $66.35 should be signed in ink and returned to this office before September 7th. However, if you wish to apply the dividends the attached voucher as well as the note for $4.39 should be signed and returned.

In the event that you do not wish to make a note for this small amount, you may forward check with the voucher and we will immediately mail you receipt for the premium.

Yours very truly, C. R. Randall, Cashier, by J. C. Williams. JCW:MMH.

EXHIBIT No. 11

Request to apply dividends left on deposit in reduction of premium and interest, if any.

——, 193-.

To New York Life Insurance Company, 51 Madison Ave., Madison-Square, New York, N. Y.

GENTLEMEN:

I hereby request that the sum of $61.96 from dividends left on deposit under Policy No. 10,340,535-S8 be used in reduction of the payment due Aug. 7, 1931.

(Please sign here) ——, Owner of Policy.

The amount of Dividends used has been indicated on the renewal Receipt.

——, Cashier.

[fol. 82] EXHIBIT No. 12

Premium Lien Note

$4.39. September 7, 1931.

The undersigned hereby jointly and severally promise to pay to the New York Life Insurance Company, at its Home Office, in the City of New York, the sum of Four and 39/100 dollars, with interest thereon as hereinafter stated, for

premium due on the 7th day of August, 1931, and to cover an existing note of $—— and interest thereon, on Policy No. 10,340,538 issued by said Company on the life of Roy T. Mobley.

This Premium Lien Note is given by the undersigned and accepted by said Company in lieu of cash for said premium, and is a lien against said policy and an indebtedness thereon.

The undersigned further agree as follows:

1. To pay said Company on the next anniversary of said policy, interest on said sum at the rate of six per cent per annum from this date to said anniversary, and annually thereafter on each anniversary of said policy. If interest is not paid on the date when due, it shall be added to the principal and bear interest at the same rate; and the undersigned agree to make and deliver to said Company at any time, and from time to time, such other and further note or notes, if any, as said Company may demand of them, for the purpose of giving effect to this paragraph.

2. Said indebtedness shall become due and payable either

(a) If there is default in the payment of any premium on said policy, in which event the sum so due and payable [fol. 83] with interest, shall, without demand or notice of any kind, every demand and notice being hereby waived, be deducted in the manner provided in said policy, and thereupon said indebtedness shall be deemed full paid and satisfied; or,

(b) On the maturity of said policy as a death claim or as an endowment, or on the surrender of said policy for a cash value before default in the payment of premium. In any such event the amount so due and payable shall be deducted from the sum to be paid or allowed under the policy; but

(c) The undersigned reserve the right to pay said indebtedness in cash at any time before it shall otherwise have been satisfied in accordance with the terms of said policy and this agreement.

3. Whenever the total indebtedness to the Company on said Policy, however evidenced, shall equal its cash Surrender Value then in the event of failure to pay interest

thereon, said Company shall mail to the last known address of the insured, and of the assignee of record at the Home Office of the Company, if any, a notice that the total indebtedness to the Company on said policy equals its Cash Surrender Value and thereupon said policy shall, one month after the mailing of said notice, and whenever said policy so becomes void and of no effect, all said indebtedness to the Company shall be deemed fully paid and satisfied.

Signature of the Beneficiary or Assignee, if any:

_____.

Signature of the person whose life is insured:

_____.

[fol. 84] EXHIBIT No. 13

Lucedale, Mississippi, September 25, 1931.

Mr. W. Y. Gilbert, % N. Y. L. I. Co.; Branch Office, Tower Building, Jackson, Mississippi.

DEAR MR. GUILBERT:

It is now three and one half months since the company stopped paying my disability benefits, and if you have not yet received a report on my claim, please transmit to the proper department my request for an immediate decision on my case.

If the company thinks it can defeat my claim, let them say so and we will see if they have anything to stand on, if not it is time that I received a little consideration.

The courtesy and attention which you and others in the Jackson office have given to my case makes it a little hard for me to express what I am compelled to think in regard to the treatment I have received by the company, but it is beginning to look like I am going to have to face the fact that the home office is determined to pursue a course which omits all consideration of our own welfare.

All the insurance I have is with the N. Y. L. I. Co., placed there, not because of the liberality or cheapness of its insurance, (which it certainly is not), but because I believed that the company did not constantly delay and harass its

policy holders in the payment of their claim, or in giving definite well founded decisions upon them. If the N. Y. L. I. Co., is going to degenerate into the class of these over-night health and accident companies, then I think it is about time our state took public notice of the matter.

I cannot wait longer than October 3d on this matter, A lawsuit will be expensive for us both and would cause me [fol. 85] to lose a large part of my insurance anyway, but it would settle the matter.

I will appreciate your bringing this request to the immediate attention of the company, as I cannot delay any longer.

With my best regards, I am

Sincerely yours, —— ——.

EXHIBIT No. 14

September 26th, 1931.

Mr. R. T. Mobley, Lucedale, Miss.

Re Pol. No. 10,340,538

DEAR MR. MOBLEY:

Your letter of September 25th, addressed to our representative, Mr. W. Y. Guilbert, has been referred to this office for attention.

I am indeed sorry, Mr. Mobley, that this matter has been delayed so long but feel certain that the Company is going to give you every consideration, and that you will receive every benefit to which you are entitled under the policy.

I am forwarding this letter to the Home Office this date, and I trust that you will defer any legal action until we can get a reply.

Yours very truly, C. E. Randall, Cashier. CER:-EMR.

Have asked for answer by wire by the 3rd.

[fol. 86] EXHIBIT No. 15

No. 123495

Waiver of Premium Statement

New York Life Insurance Company

51 Madison Avenue, Madison Square

New York, October 5, 1931.

To the Holder of Policy Number 7,802,419, R. T. Mobley:

On account of disability of the insured under the above numbered policy, the New York Life Insurance Company hereby waives payment of the semi-annual premium of $25.04 on said policy, falling due on the 2nd day of July, 1931, but without waiving or otherwise changing any of the terms of conditions of said policy.

This statement shall have no force or effect unless it is countersigned by the Registrar of the Company.

Countersigned by J. W. Baker, Registrar.

EXHIBIT No. 16

No. 123496

Waiver of Premium Statement

New York Life Insurance Company

51 Madison Avenue, Madison Square

New York, October 6, 1931.

To the Holder of Policy Number 10,340,538. R. T. Mobley:

On account of disability of the insured under the above-numbered policy, the New York Life Insurance Company [fol. 87] hereby waives semi-annual payments of the premium of $66.35 on said policy falling due on the 7th day of August, 1931, but without waiving or otherwise changing any of the terms or conditions of said policy.

This statement shall have no force or effect unless it is countersigned by the Registrar of the Company.

——— ———, President.

Countersigned by J. W. Baker, Registrar.

EXHIBIT No. 17

October 9th, 1931.

Mr. Roy T. Mobley, Lucedale, Miss.

Re Pol. 7,802,419-10,340,538

DEAR MR. MOBLEY:

We enclose to you statements waiving payment of semi-annual premium due July 2nd, 1931 under the former policy and waiving payment of semi-annual premium due August 7th, 1931 under the latter policy.

We also enclose Company's check No. 78077 issued to you for $24.04 in refund of the amount paid account of the premium under the former policy. Kindly return to this office the Company's official receipts which we sent to you.

We are writing our Home Office in New York City relative to the settlement of the premium under the latter policy by loan, and will advise you in due course relative to the same.

In the next few days we will forward to you check in settlement of disability income payments due you.

Yours very truly, E. M. Randall, Cashier. EMR.

[fol. 88] EXHIBIT No. 18

Oct. 12th, 1931.

Mr. Roy T. Mobley, Lucedale, Miss.

Re Pol. Nos. 7,802,419-10,340,538

DEAR FRIEND MOBLEY:

I am indeed glad to be able to enclose in this letter checks from the Company for $150.00, $70.00 and $60.00 which cover the disability payments from the date on which they were stopped to November, 13th, 1930.

I have appreciated your position in this matter, as you knew that you were entitled to the payments and I had the same feeling about it. I appreciated it, too, because it is hard enough for a man to battle to regain his health with circumstances ideal, without being bothered by other matters. However, as things stood, due to erroneous reports, it just took a little time to get the stream back into the main channel again.

Somehow things like these will come into a fellow's life once in a while and they carry a lesson with them, as in the end things work out alright. As they say "we never miss the water until the well runs dry" and as long as things are running aright we just take them as a matter of course and do not consider that we are fortunate. When the well runs dry then it is that we appreciate the water.

Please rest assured of the fact that it is my desire to serve you at any time that the occasion arises and that I endeavor at all times to get myself attune- to the feeling of the fellow that I am seeking to serve and feel with him the things that he feels, so that I may thus be the better [fol. 89] enabled to serve him as I, to some degree, have a sympathetic feeling born of understanding.

Well, I guess the old sun looks brighter today, the flowers more beautiful and it isn't so hard to smile, so again I feel with you the pleasure of things being righted again, and rejoice with you—so after all life isn't such a common thing after all.

With best wishes, I am

Sincerely yours, W. Y. Guilbert, Special Agent.

Exhibit No. 19

October 31, 1931.

Mr. Roy T. Mobley, Lucedale, Mississippi.

Re Pol. No. 10,340,538

Dear Sir:

The premium which was due August 7th on your above policy was originally paid by lien note, but as you know, it has now been waived, and we are therefore returning the

note properly canceled, leaving the policy free of indebtedness.

Yours very truly, C. E. Randall, Cashier. JCW: MMH.

[fol. 90] EXHIBIT No. 20

Please return this notice with your remittance

New York Life Insurance Company,

Home Office, 51 Madison Avenue, Madison Square,

New York, N. Y.

Hereby gives notice that a payment will be due as specified below provided the policy is then in force.

Amount Due, Premium $66.35.
Policy Number 10,340,538-S8.
Date due, 7 Day of Feb., Year 1932.
Interest on Loan or Note, ——.
Roy T. Mobley, Box 369, Jackson, Miss.
JAC.

Payment must be made to the cashier of the Company's Jackson Branch Office, Jackson Tower Bldg., 127 Roach St., Jackson, Miss., or to the premium cashier at the home office.

Office Hours: 9 A. M. to 4 P. M. Saturday only: 9 A. M. to 12 P. M.

Unless said payment shall be made to the company or to the duly appointed agent or person authorized to collect it by or before the date it falls due, said policy and all payments thereon will become forfeited and void except that [fol. 91] this notice shall not affect either the period of grace, or the right to non-forfeiture benefits, if provided for in the policy or by statute.

Make payments only in exchange for the company's official premium receipt signed by the president and countersigned by the person to whom payment is made. Remittances may be made by bank draft, check, post office or express money order payable to the order of New York Life Insurance Company, at par at New York or at the place of payment indicated on the face of this notice.

Please notify in writing the office to which you pay your premiums of any error or change in your post-office address, giving the number of each policy you hold.

Thomas A. Buckner, President.

3472-N. March 1931.

EXHIBIT No. 21

New York Life Insurance Company,

Home Office, 51 Madison Avenue, Madison Square,

New York, N. Y.

Mar. 3, 193-.

Reminds you that to this date, ———, the payment specified below has not been received by this company.

Amount due, Premium $66.35.
Policy Number 10,340,538-S8.
Date due, 7 Day of Feb., Year 1933.
Interest on Loan or note, ——.
Roy T. Mobley 927 Inge St., Jackson, Lucedale, Miss.
[fol. 92] Grace expires Mar. 10, 1933.

This policy will lapse unless the premium is paid within the period of grace provided in the policy for paying premiums.

Cashier, Jackson Branch Office, Jackson Tower Bldg., 127 Roach St., Jackson, Miss.

Office Hours: 9 A. M. to 4 P. M. Saturdays: 9 A. M. to 12 M. only.

Make payment only in exchange for the company's official receipt signed by the president, countersigned by the person to whom payment is made. Make remittance payable to New York Life Insurance Company.

3472—Remind. March 1931.

EXHIBIT No. 22

New York Life Insurance Company,
51 Madison Avenue, Madison Square,
New York, N. Y.

Committee on Disability Claims

John C. McCall, Vice-President,
Crank S. Lantry, Chairman,
J. N. Bell, Vice-Chairman.

March 19, 1932.

Mr. Roy T. Mobley, 535 Valley Street, Jackson, Miss.

Re Policy; 7,802,419, 10,340,538, Claim No. 64,183-B

DEAR SIR:

Referring to the above numbered policies, on your life, on which policies monthly disability income payments have [fol. 93] been made to February 13, 1932, inclusive, it appears to the Company, from information recently received, that you are no longer continuously totally disabled within the meaning of the Disability Benefit Provision contained in the policies.

In view of this condition, we regret we find it necessary to say that no further monthly disability income payments will be made and the premiums hereafter due become payable in conformity with the terms of the contracts.

Yours truly, F. S. Lantry, Chairman.

EXHIBIT No. 23

April 20th, 1932.

Mr. Roy T. Mobley, 535 Valley St., Jackson, Miss.

Re Claim No. 64,183-B, Pol. 7,802,419-10,340,538

DEAR SIR:

We have received for attention from the Company's Branch Office in Jackson, Miss., your communication of April 4th, 1932, and in view of your contention that you

are still totally disabled, we will be pleased to give further consideration to your claim.

We are arranging to have another of the Company's Medical Examiners call upon, and in the meantime should like to receive a detailed statement regarding your condition from Dr. J. E. Beck to whom you refer in your communication.

Yours truly, F. S. Lantry, Chairman. B. CB:SN.

[fol. 94] EXHIBIT No. 24

April 7th, 1932.

Mr. Roy T. Mobley, Lucedale, Miss.

Re Pol. No. 10,340,538

DEAR SIR:

This will acknowledge receipt of your letter of April 4th, and I am very sorry we have had so much difficulty with your claim. I am sending your letter on to New York today, asking for a reconsideration of the claim, and will advise you promptly upon receipt of a reply.

Yours very truly, C. C. Randall, Cashier. CER: EMR.

EXHIBIT No. 25

May 18th, 1932.

Mr. Roy T. Mobley, Lucedale, Miss.

Re Pol. No. 10,340,538

DEAR SIR:

We have received your letter of the 16th instant, and have noted its contents.

We are this date referring your letter to our Home Office in New York City for the attention since they pass on all disability claims.

Yours very truly, C. E. Randall, Cashier. R. EMR.

[fol. 95] EXHIBIT No. 26

R. T. Mobley, 927 Inge Street, Jackson, Mississippi

December 22, 1932.

New York Life Ins. Co., Jackson, Mississippi, Tower Building.

Re. Pols. 7,802,419 et al. Disability Benefit Dec. 13, 1932

GENTLEMEN:

Unless I receive some word from the Company as to why my disability benefit which became due on December 13, 1932, has not been paid; I shall be compelled to act as if the Company had denied further liability. If your company is delaying until they can get a report from their nine hundred and ninety-ninth detective, they could at least tell me that they are holding it up pending further investigation. I must have some word about this before December 27.

Very truly yours, R. T. Mobley, 927 Inge Street, Jackson, Mississippi.

[fol. 96] EXHIBIT No. 27

Dec. 27, 1932.

Mr. R. T. Mobley, 927 Inge Street, Jackson, Mississippi.

Re Pols. No. 7,802,419-10,340,536, Claim No. 64,183-B

DEAR SIR:

In reply to your letter dated December 17, 1932, we wish to advise that the Company has approved payment of the disability income payments under the above numbered policies, due as of December 13, 1932. In all probability by the time you receive this letter, you will have received checks in payment of these items.

Yours very truly, Frank S. Lantry, Jr., Chairman.

EXHIBIT No. 28

January 19, 1933.

Mr. Roy T. Mobley, Lucedale, Miss.

Re Claim No. 64,183-B, Pol. No. 10,340,538, etc.

DEAR SIR:

The Company is taking up the question of continuance of total disability for the purpose of considering making payment of monthly disability income due February 13, 1933. [fol. 97] We request that you kindly answer the questions on the enclosed Form No. 3a, application for continuance of benefits, have same duly attested before a Notary Public and forward as promptly as possible to this office.

Yours very truly, Frank S. Lantry, Chairman. C.C.

CC. Enc.

EXHIBIT No. 29

6014-A—Sept. 1932. Form No. 3-A.
Printed by New York Life Ins. Co., New York City.

Insured's Statement 1. No. 64,183-B

Application to New York Life Insurance Company for Continuance of Disability Benefits under Policy No. —

1. Full name of insured. Roy T. Mobley.

2. Have you resumed working? No.

3. If not, are you prevented from working solely because of bodily injury or disease? (State facts briefly). Yes.

4. Have you attempted to do any work since your disability began? (If so, state facts.) No.

5. Are you confined to bed? Partially.

6. Are you confined to the house, a hospital, or a sanitorium? (If so, state which and how long confined). My condition keeps me in the house most of the time.

[fol. 98] 7. To what extent are you able to be out of doors? No definite period.

8. Describe your daily activities briefly. Get up. 10 A. M. to Noon, sit in chair or lie on day bed, reading, listening to radio, or doing nothing until bed time 10 P. M., eat noon and 6 P. M., go out when absolutely necessary. Occasionally take short walk or ride in late afternoon for health, sleep fitfully.

9. If not working, when do you expect to resume work? See back.

10. How often is it necessary for you to consult a physician? As often as I can afford.

11. When did you last consult a physician? (Give name and address of last physician consulted.) Dr. J. E. Beck, Mobile, Ala., in Nov., 1932.

12. From what companies or associations are you now receiving disability benefits?) State amount of benefits received monthly from each). Only New York Life — $70 per month.

13. Has any company or association discontinued payments of benefits? One month you cut me off and the next you suspend my benefits.

Signature of Insured—Roy T. Mobley. Present Address—927 Inge Street, Jackson, Mississippi.

Sworn to before me this 24th day of January, 1933.

———, Notary Public.

Please use the other side of this form to give any further information you think the company should have.

[fol. 99] I have been disabled for more than two years without any noticeable improvement in my condition. I no longer entertain any hope of being able to return to active practice of the law. Whenever I attempt any kind of exercise, mental or physical, there is an immediate and rapid deterioration of my physical and nervous system. My doctors have advised me take as much exercise as I feel able to do, but as yet I have been unable to find any kind of exercise which I could repeat each day without injury to myself.

My problem is a two-fold one of first rebuilding my health to the point where I can do a sufficient amount of

physical exercise regularly and second to find some means of livelihood which will require a minimum of physical action, and which at the same time will not overstrain my nervous system.

I am doing the best I can to rehabilitate myself, and would appreciate it if you would spend some time trying to help me do so, rather than worrying me with a constant stream of investigators.

Roy T. Mobley.

EXHIBIT No. 30

Copy

Lucedale, Miss., Feb. 22, 1933.

New York Life Insurance Co., 51 Madison Ave., Madison Square, New York, N. Y.

Re Pols: 7802419-10340538

GENTLEMEN:

As you have had ample time to complete your investigation of my continued disability, I must ask you to please [fol. 100] send me a check for the February 13th installment. Your methods of harassing me about these benefits are a constant hindrance to the treatment of my disability.

Very truly yours, Roy T. Mobley, Lucedale, Mississippi.

EXHIBIT No. 31

Copy

Lucedale, Mississippi, Feb. 28, 1933.

New York Life Insurance Co., 51 Madison Ave., Madison Sq., New York City, N. Y.

In Re Disability Benefits

GENTLEMEN:

Unless I receive a check by return mail for the February 13th installment of my disability benefits, I shall be com-

pelled to act on the assumption that you are denying liability for same. I shall accept your continued silence as confirming such a view of the matter.

Very truly yours, R. T. Mobley, Lucedale, Mississippi.

[fol. 101] EXHIBIT No. 32

Copy

Lucedale, Mississippi, Mar. 6, 1933.

New York Life Ins. Co., 51 Madison Ave., Madison Sq., New York City, N. Y.

Re Pols. 10340538, etc.

GENTLEMEN:

I am taking legal steps, immediately, to secure my benefits under the above policies.

Very truly yours, Roy T. Mobley.

EXHIBIT No. 33

New York Life Insurance Company,

51 Madison Avenue, Madison Square,

New York, N. Y.

Date: April 13, 1933. Branch Office at Jackson, Miss. Policy 10,340,538.

Mr. Roy T. Mobley, Lucedale, Miss.

DEAR SIR:

Your above numbered policy has lapsed for the non-payment of premium. The Company urges you on receipt of this letter to apply for the reinstatement of the policy. Please complete this Application for Reinstatement printed on the back and have your signature duly witnessed.

[fol. 102] Return the application to me together with $66.35 and 6% interest thereon from the 7th day of February, 1933.

In order to protect your own interests I trust you will give this matter your prompt attention.

Very truly yours, C. W. Cherry, Cashier.

The interest up to April 20th will amount to 78c. Please include this interest in your remittance.

P. S.—The attached form No. 224 D (over) is to be executed without expense to the Company by one of the following: J. A. Dorsett and J. W. Horn.

Lmb.

Application to the New York Life Insurance Company

Home Office: 51 Madison Avenue, Madison Square,

New York, N. Y.

For Reinstatement of Policy No. ——, Amount, $——.

I hereby apply for the reinstatement of the above numbered policy which lapsed for non-payment of premium due on the — day of ——, 19—, and, for the purpose of inducing the Company to reinstate said Policy, I make the representations contained in the following questions:

Complete and Sign in Ink.

1. Are you now, to the best of your knowledge and belief, in the same condition of health as you were when the policy was issued: (If not, give details.) Ans.

[fol. 103] 2. Within the past two years have you had any illness, diseases or bodily injuries or have you consulted or been treated by any physician or physicians? (If so, give full details, including nature, date, and duration of each illness, disease or injury, the name of, each physician, and the dates of and reasons for consultation or treatment.) Ans.

3. Has any Company or Insurer, within the Past two years, examined you either on, or in anticipation of, an application for life insurance, or for the reinstatement of life insurance without issuing or reinstating such insurance? (If so, give name of each Company or Insurer.) Ans.

If the evidence of my insurability is satisfactory to the Company and it has received all sums the Policy requires to be paid for reinstatement, then, and not until then, said Policy shall be deemed reinstated. If said policy is not so reinstated, I agree to accept return of all sums paid in connection with this application, without interest.

I hereby certify that the foregoing answers are full, complete and true, and agree that the Company believing them to be true shall rely and act thereon.

Dated at —— this — day of ——, 19—.

Signature of insured: —— ——.

My Post-Office Address is: ——.

Witness: ——. Address: ——.

This space for cashier's "Date Received Stamp".

Approved by —— ——, Cashier, on the — day of ——, 19—.

o 4778. March 1932. Printed by New York Life Ins. Co., New York City.

[fol. 104] IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DIVISION OF THE SOUTHERN DISTRICT OF MISSISSIPPI

Law. No. 1001

ROY T. MOBLEY, Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, Defendant

Bill of Exceptions—Filed May 10, 1934

Be it remembered, that on the 22nd day of February, 1934, said date being one of the days of the regular February term of said Court of the year aforesaid, and by consent of the parties, the two cases having been consolidated for trial, the plaintiff to maintain the issues in his behalf, this cause coming on for trial before Honorable Edwin R. Holmes, Judge of said Court, and the jury impaneled therein, the following proceedings were had, to-wit:

DR. J. E. BECK, witness for the plaintiff, first being sworn, testified as follows:

I live in Mobile, Alabama, and practice medicine and surgery and have been engaged in this profession for twenty years and am duly licensed to practice medicine in three States. I have known Roy T. Mobley for a little over two years and saw him just a few minutes ago. The last time I saw him before this occasion was in April, 1933.

Q. Dr. Beck, when you saw him in April, 1933, I will ask you to state whether or not, in your opinion, he was totally disabled from performing any work?

(Defendant objected to this question, stating: "We have an agreement, and we agreed in open court that up to [fol. 105] date he is totally and permanently disabled within the meaning of the policy so as to entitle him to the benefits."

By Mr. Mize: That is correct

Q. You say you saw him today?
A. Yes, sir.
Q. I will ask you to state, in your opinion, whether or not he is totally and permanently disabled?
A. I consider him so.

By the Court: I thought he agreed to that.
By Mr. Mize: In the future, I am talking about.
By the Court: I understood you to say permanently.
By Mr. Watkins: Totally and permanently up to this date, but we have not agreed that he will not get well. That is not relevant now, because we admit liability.
By Mr. Mize: That brings on the question which is before the Court, and I have a decision squarely to the point if your Honor wants to hear it at this time.
By the Court: I think the testimony is competent, unless it is agreed that he is permanently disabled.
By Mr. Watkins: We have agreed that he is totally and permanently disabled within the meaning of the policy, but [fol. 106] we don't concede that the permanency is—that is, to leave out the future.
Objection overruled by the Court.

I consider that he is totally and permanently disabled from ever being able to engage in any work that he shall

carry on as a lawyer. He is suffering from myocarditis and indocarditis and the treatment of the above is rest, and if he is enabled to be relieved of worries from a financial standpoint and receive complete rest it will prolong for a greater length of time his life.

(Defendant objected to the testimony in regard to the future disability of the plaintiff because it is not relevant to this insurance, and the objection was overruled,) Defendant excepted.

The plaintiff was suffering from myocarditis which is a degeneration of the heart muscle, being a heart trouble. Angina pectoris and myocarditis are frequently associated, but angina pectoris is not a disease, it is only a symptom. Myocarditis is a trouble that angina pectoris is a symptom of. I believe I operated on him for Appendicitis in December, 1930, my record will show that. The condition I find him in now has no connection with his appendicitis operation. It is entirely different trouble. I examined him a few minutes ago and he has myocarditis. This is shown by taking the blood pressure. I noticed no other trouble with him. He is apparently thinner. I don't know what he weighed before and don't know what he weighs now, but apparently he is thinner. I read his blood pressure just a few minutes ago and it was 108 over 78, then I read [fol. 107] it again and it was 100 over 80 making a pulse pressure of 20 when it should have been a pulse pressure of 50.

Thereupon the plaintiff next offered an agreed statement of facts which were made subject to certain objections and exceptions as to relevancy and competency and before reading the agreed statement of facts Mr. Watkins on behalf of the defendant made the following objections to the introduction of the letters contained in the agreed statement of facts in the following language:

"Plaintiff alleges in his declaration that the breach occurred subsequent to January 13, 1933. He doesn't allege any breach prior to January 13, 1933. On the other hand, he alleges that the defendant paid him all amounts of money coming to him up to and including January 13, 1933, but that the defendant, in March following that, repudiated that or breached the contract by announcing that no further

sums would be paid. We pleaded to that, and the plaintiff comes back and calls attention to the fact that upon three occasions prior to that time we discontinued payments, and we claim that is a departure from the declaration, that the only breach set out is that following January 13, 1933, and no evidence of a further breach should be admitted. Move to exclude it.

By Mr. Mize: To our declaration he filed a special plea in which he set up that the company was acting in good faith, and had received reports that they believed to be true that he could go back to work, and that they kept an open mind even up to the last minute, and that they therefore had not breached the contract, but had simply sus- [fol. 108] pended the payments thereon, and to that replication we filed—to that special plea we filed a replication in which we denied that they were acting in good faith; denied that they received any reports upon which they were justified in acting, and denied that they kept an open mind. Set letters out in the replication to that. Those are the letters he is objecting to and the theory on which we say it is competent to show they were not keeping an open mind."

The agreed statement of facts were then read to the Court and the jury as follows:

AGREED STATEMENT OF FACTS

"In order to minimize the record and dispense, so far as possible, with the introduction of oral evidence in the case, subject to objections for incompetency, immateriality and irrelevancy, the plaintiff and the defendant, for the purpose of this trial only, stipulate that the following facts are true and correct:

(1) That the New York Life Insurance Company is a corporation, organized under the laws of the State of New York, domiciled in the city of New York, State of New York.

That it issued to the plaintiff the two policies of life insurance described in the declarations in the above entitled causes, to-wit: Policy No. 7,802,419, and subsequent thereto Policy No. 10,340,538, reference to which is now made.

That all premiums upon said policies maturing up to January 1, 1931, were paid by the assured.

That on or about the 6th day of April, 1931, the defendant received at its Home Office, through its Branch Agency at Jackson, Mississippi, a letter from the plaintiff, dated [fol. 109] March 31, 1931, in words and figures as follows:

"Jackson, Miss., March 30, 1931.

Mr. W. Y. Guilbert, % New York Life Ins. Co., Jackson Branch Office, Jackson, Mississippi.

DEAR MR. GUILBERT:

I was on the point of writing the Company about my case when your letter arrived. I have not moved from Jackson, but am here at Lucedale trying to recover my health. The facts about my case are as follows:

I retired Saturday night of December 13, 1930, with a light constant pain ranging generally over my abdomen. I was unable to sleep that night, and the next morning as the pain had increased, I remained in bed and called in Dr. N. R. Currie. Dr. Currie treated me for the pain and came out to the house to see me during that day and the next. Monday afternoon, December 15, 1930, the pain began to settle in my right side and about 10 o'clock that night became so acute I was carried to the Baptist Hospital. Dr. Shands operated on me shortly after I reached the hospital and found a very bad appendix, gangrenous and about ready to rupture. I remained in the hospital about fifteen days and was then carried to my apartment, 1283 N. Congress St., where I was confined to my bed until January 25, 1931. As soon as I had been up long enough to withstand the trip, I came on down to Lucedale hoping that the warmer climate and quiet would enable me to [fol. 110] quickly recover. I made no report of my operation to the Company as I had no idea that my disability would continue longer than two or two and one-half months.

My system seems to have been so poisoned by the infection however, that I seem to make very little progress toward recovery. Soreness persists through my side and back, where I understand the appendix had attached itself to my back, and there is still a kind of paralysis of the wall of my abdomen where the drain tube was placed. Anything except the slightest mental or physical exercise, at

the present time, quickly exhausts me and causes an aggravation of the soreness in my side which lasts several days.

I closed my office before leaving Jackson and have been compelled to place my practice in the hands of other attorneys.

The date of my recovery now seems to be so indefinite that I feel compelled to ask for the benefits under my policies with the Company, and assure you that I will appreciate your attending to the matter for me. I have two policies; One $5,000. No. 10,340,538, and the other $2,000 No. 7,802,419. Both carry disability benefits.

You can get in touch with my doctors by calling Dr. N. R. Currie at his office in the Standard Life Building, and Dr. H. R. Shands at his office in the Lamar Life Building.

Until further notice, address me at Lucedale, Mississippi.

Sincerely thanking you for your offer to assist me in this matter I am

Very truly yours, (Signed) R. T. Mobley."

That accompanying said plaintiff's letter above set out was a statement executed by R. T. Mobley, the plaintiff to W. Y. Guilbert, in the defendant's branch Agency at Jack-
[fol. 111] son, Mississippi, said statement being in words and figures as follows:

New York Life Insurance Company

Darwin P. Kingsley, President,

Jackson Branch Office

March 31st, 1931.

Mr. W. Y. Guilbert, Office.

Re R. T. Mobley

DEAR MR. GUILBERT:

We are in receipt of letter from the above insured in which he makes application for disability benefits.

In order that this matter may be given our attention, kindly have the insured answer the questions on the bottom of this letter and return to us.

Yours very truly, (Signed) C. E. Randall, Cashier.

CER: EMR.

1. Number of policies.

2. Full name—Roy T. Mobley.

3. Present address—Lucedale, Mississippi.

4. Previous residence address—1283 N. Congress, Jackson, Miss.

5. Occupation when disability began—Lawyer.

[fol. 112] 6. Employer's name and address when disability began—Self.

7. Previous occupation—Lawyer—Student.

8. Previous employer's name and address—Code Commission, J. Morgan Stevens, Chairman, Jackson, Miss.

9. Cause of disability—Appendicitis.

10. Date disability commenced—December 13, 1930.

11. Names of attending physicians, address, date first consulted.

Dr. N. R. Currie, Standard Life Bldg., Jackson, Miss. Dec. 14, 1930.

Dr. H. R. Shands, Lamar Life Bldg., Jackson, Miss. Dec. 15, 1930.

The above is true and correct information to the best of my knowledge.

(Signed) R. T. Mobley, Insured, Lucedale, Mississippi.

The defendant furnished to the plaintiff blanks to enable the plaintiff to submit to the defendant proof of his alleged disability claim; that the plaintiff's proof consisted of a statement of Dr. H. R. Shands, of Jackson, Mississippi, and Dr. N. R. Currie, of Jackson, Mississippi, under date of April 13, 1931, together with the plaintiff's statement dated April 9, 1931, which three statements together were re- [fol. 113] ceived by the defendant at its home office on April 15, 1931, and are in words and figures as follows:

Form No. 2

New York Life Insurance Company, 51 Madison Avenue, Madison Square, New York, N. Y.

Attending Physician's Report on Claim for Disability Benefits

(To be furnished without expense to the Company.)

1. Name of Insured: Roy T. Mobley.

2. Residence: Jackson, Miss.

3. Is Insured now under your treatment? No.

4. Date of first consultation in present disability? Dec. 15, 1930.

5. History given you at that time? Acute appendicitis—former stomach trouble.

(a) Date of onset of present disability? Dec. 13, 1930.

(b) Predisposing cause, if any, of present disability? Don't know, acute, gangrenous appendicitis.

(c) Names and addresses of any physicians previously consulted by insured—Dr. N. R. Currie, Jackson, Miss.

6. If you were consulted for any cause prior to the present disability, give dates and details of such consultations or treatments. Not consulted.

[fol. 114] 7. Diagnosis and symptoms of disease, infirmity, or injury causing disability. Acute gangrenous appendicitis—appendix removed.

8. (a) Is the insured in your opinion wholly disabled and prevented from engaging in any occupation whatsoever for remuneration or profit? No—not from appendicitis alone. Have not treated him for anything else.

(b) If he is, from what dates, to your knowledge, has he been so prevented?—

9. Give your opinion as to whether or not the insured will be permanently, continuously and wholly prevented for life from pursuing any and all gainful occupations, by rea-

son of this disability? Have only treated him for the appendicitis operation.

Signature: H. R. Shands. Post Office Address: Jackson, Miss.

Dated 4-13-31.

Form No. 2

New York Life Insurance Company, 51 Madison Avenue, Madison Square, New York, N. Y.

Attending Physician's Report on Claim for Disability Benefits

(To be furnished without expense to the Company.)

1. Name of Insured: Roy T. Mobley.

2. Residence: Lucedale, Miss.

3. Is insured now under your treatment? Yes.

[fol. 115] 4. Date of first consultation present disability? Dec. 14, 1930.

5. History given you at that time? Severe pains—right side abdomen.

(a) Date of onset of present disability? Dec. 13, 1930.

(b) Predisposing cause, if any, of present disability. ——.

(c) Name and addresses of any physicians previously consulted by insured. None for appendicitis.

6. If you were consulted for any cause prior to the present disability, give dates and details of such consultations of treatments. No.

7. Diagnosis and symptoms of disease, infirmity or injury causing disability. Acute appendicitis, gangrenous & ruptured.

8. (a) Is the insured in your opinion wholly disabled and prevented from engaging in any occupation whatsoever for remuneration or profit? Yes.

(b) If he is, from what date to your knowledge, has he been so prevented? 12-14-1930.

9. Give your opinion as to whether or not the insured will be permanently, continuously and wholly prevented for

life from pursuing any and all gainful occupations by reason of this disability? Indefinite.

[fol. 116] Signature: N. R. Currie. Post Office Address: Jackson, Miss.

Dated 4-13-1931.

Form No. 1

Claims for Disability Benefits

New York Life Insurance Company,

51 Madison Avenue, Madison Square,

New York, N. Y.

1. No. of policy	Date of policy	Amount
7,802,419	(In hands of assignee 1925 or 1926).	$2,000.00
10,340,538	August 7, 1928	5,000.00

2. Give name in full: Roy Thurston Mobley.

3. Date of birth: June 3, 1902. Place of Birth: Utica, Miss.

4. In what other companies and for what amounts are you insured under policies providing for disability benefits or health benefits. None.

5. Permanent residence: Jackson, Mississippi.

6. Where can you be called on in person now? Lucedale, Mississippi.

7. (a) Occupation at time disability began. Lawyer.

(b) Business address: 1014 New Merchants Bank Building, Jackson, Miss.

8. (a) Are you wholly disabled at the present time? Yes.

(b) State cause of disability? Appendicitis.

[fol. 117] 9. (a) On what date did this illness begin that led up — the present disability and what was the nature of the illness? December 13, 1930, Pain in abdomen.

(b) Give name and address of the first physician consulted at the beginning of that illness. Dr. N. R. Currie, Standard Life Building, Jackson, Mississippi.

(c) State date on which you first consulted that physician? December 14, 1930, about 8 A. M.

(d) Give names of all other physicians consulted and date of such consultations. Dr. H. R. Shands, continuously from Dec. 15, 1930, until about Feb. 1, 1931.

10. From what date has your disability prevented you from engaging in any occupation whatsoever for remuneration or profit. December 13, 1930.

11. I expressly waive on behalf of myself and of any person who shall have or claim any interest in the above numbered policy, all provision of law forbidding any physician or any other person who has heretofore attended or examined me, from disclosing any knowledge or information which he thereby acquired.

Insured's Signature: Roy Thurston Mobley.

Dated at Lucedale, Miss., Apr. 9, 1931.

That under date of April 15th, 1931, the defendant, through its Branch Agency, in Jackson, Mississippi secured the plaintiff to be examined by one of its medical examiners, Dr. J. C. Huggins, who was a competent and reputable physician; that Dr. Huggins' examination dated April 15, [fol. 118] 1931, was received by the defendant at its home office April 18, 1931, and is in words and figures as follows:

Form No. 5

New York Life Insurance Company

Medical Examiner's Report on Claim for Disability Benefits

1. (a) Name of Insured: Roy T. Mobley.

(b) Approximately: Age, 29; Height, 5-8; Weight, 152; Color of Hair, Brown; Color of Eyes, Blue.

2. Residence: Lucedale, Miss.

3. How well do you know Insured? Several years.

4. What is the nature of the injury, infirmity of disease of the insured for which disability is claimed? Attack of appendicitis, 13th of Dec., 1030—operated Dec. 15th—confined to bed until 24th Dec. Had drainage tube in side for several weeks.

5. (a) What was the condition of health of the insured for the year preceding the date of the present disability? Sluggishness—but in good health.

(b) When did the illness begin which led up to the Insured's present disability? Dec. 13th, 1930.

(c) When did insured first consult a physician in connection therewith? Dec. 14th, 1930.

(d) From what date has he been prevented by reason of his disability from engaging in any occupation whatsoever for remuneration or profit? Dec. 13th, 1930, to April 14th, 1931.

[fol. 119] (e) Give full particulars and the name and addresses of all physicians consulted? Dr. N. R. Currie, Jackson, Miss., Dr. H. R. Shands, Jackson, Miss.

6. Give your opinion as to whether or not the insured will be permanently, continuously and wholly prevented thereby for life from pursuing any and all gainful occupations by reason of his disability? Do not think he will be permanently disabled—as his strength is improving—probably be 60 days before he can resume occupation.

7. After careful examination to what extent do you find insured disabled, and due to what cause? Able to be up and about since Jan. 24th—walks with stick. His physician Dr. N. R. Currie advised rest for about 12 months. My opinion is that this man has had a stormy time with a ruptured appendix and of course still has some weakness and soreness in physical exercise, but he is able to be up and about, recuperating from this severe toxemia. Probably be able to resume his duties in about sixty days.

Signature: J. C. Huggins, Md.

Dated 4-15-31.

The proof submitted by the plaintiff to the defendant of his said disability being satisfactory to the defendant, between April 18, 1931, and April 25, 1931, the defendant determined that the plaintiff was totally and permanently disabled within the meaning of the policies sued upon (but defendant does not admit that the proof was conclusive as to the permanency of such disability), and allowed the disability claim to the plaintiff under said policies, and each of them, with a waiver of premium maturing January 15, 1931, on the first policy; that a copy of the memorandum [fol. 120] furnished by the defendant to its Branch Agency at Jackson, Mississippi, is attached hereto marked No. "1", and that said memorandum is as follows:

New York Life Insurance Company

Committee on Disability Claims

Jackson MFA Branch Office

New York, April 25, 1931.

Re Disability Benefits, Policies Nos. 7,802,419-10,340,538, Mobley, Cl. No. 64,183-B

1. Statement is enclosed waiving payments of premium due Jan. 9, 1931, and Feb. 7, 1931, resp.

7. Monthly disability income payments have been approved beginning with the payment due January 13, 1931.

Whereupon, on April 29th, 1931, W. Y. Guilbert, defendant's Special Agent at its Jackson Branch Agency, wrote to the plaintiff that certain letter made Exhibit 1 to the plaintiff's replication in cause No. 998, which is in words and figures as follows:

"April 29th, 1931.

Mr. Roy T. Mobley, Lucedale, Miss.

Re Pol. Nos. 7,802,419-10,340,538—Mobley

DEAR SIR:

I am enclosing two letters just received by me from the Branch Office, also check for $25.04 and two waiver of [fol. 121] premium receipts. Please Return the Receipts To Me, that were given you at the time the premium refunded was paid also the one sent you when the lien note was executed, as there are to be replaced by the waiver of premium receipts.

The check covering the monthly installments will be received in the next few days from the home office at which time I will mail to you promptly.

The statement No. 4 called for is to be executed by the present attending physician, so that the Company may determine whether or not to continue the monthly payments, after the first check is sent to you.

If I can be of any further service to you, please command me.

Sincerely yours, W. Y. Guilbert, Special Agent. WYG.
"Life Insurance is a Service, Not a Commodity."

That upon May 3, 1931, the said Guilbert, defendant's Special Agent, wrote to the plaintiff for and on behalf of the defendant that certain letter made Exhibit 2 to the plaintiff's said replication in said cause, which is in words and figures as follows:

May 3rd, 1931.

Mr. R. T. Mobley, Lucedale, Miss.

Re Pol. Nos. 7,802,419-10,340,538

DEAR MR. MOBLEY:

Received your letter of the 30th enclosing receipts. The note will be marked canceled and the dividend will be credited [fol. 122] back to the policy, and can either be left with the Company or withdrawn by you in cash, should you wish to do so.

I have just received check for $80.00 covering four months, under Number 7,802,419, and check for $200.00 covering the same period on policy No. 10,340,538. The checks are enclosed, with letters from the Company stating the period covered.

If you wish to do so, I would appreciate a letter from you giving your impression of the treatment given you by the New York Life and just how much importance you feel is attached to the disability clauses in life insurance policies. We use these letters in pointing out the importance of this kind of protection to others and a concrete case is more impressive than simply an imaginary one. I have letters from Dr. Felix J. Underwood, Dr. Van Alstine and Mr. W. G. Plummer of this City all of whom have drawn disability. If you would hesitate to do this, feel that I will not think it amiss for you to state as unless you would be willing to have a letter used we would not wish to cause you any embarrassment in the matter.

Haven't received the statement from Dr. Currie as yet, but suppose it will come along in a few days. The monthly payments will be made on the 13th of each month, for each

completed month as long as your disability lasts. So after all the 13th isn't such a bad day.

Read my motto on the bottom of the letter-head, and if there is any service that I can render you just put me to the test. You are not working any hardship on me in securing any service that I can render—that is after all what life insurance is.

With best wishes, I am

Sincerely yours, W. Y. Guilbert, Special Agent. WYG.

[fol. 123] "Life Insurance is a Service, Not a Commodity."

That plaintiff's claim for disability was allowed from January 13, 1931, the period fixed, being 30 days from the beginning of the disability as claimed by the plaintiff, and said disability claims of $70.00 per month, and $20.00 on the first policy and $50.00 on the second policy were paid up to and including June 13, 1931, said disability having been allowed and paid from and after the 13th day of January, 1931.

(2) That upon June 24, 1931, the plaintiff, at the defendant's request, again submitted himself to examination by Dr. J. C. Huggins of Jackson, Mississippi; that the said Dr. Huggins made a report to the Company giving the result of his examination of the plaintiff, the original of which was received at the home office of the defendant on or about the — day of June, 1931; that the original of said examination report is hereto attached and marked No. "2", that said report is as follows, to-wit:

Form No. 5

New York Life Insurance Company

Medical Examiner's Report on Claim for Disability Benefits

1. (a) Name of Insured: Roy T. Mobley.

(b) Approximately: Age, 29; height, 5-8; color of hair, brown; color of eyes, blue.

2. Residence: Lucedale, Miss.

3. How well do you know insured? Casually.

[fol. 124] What is the nature of the injury, infirmity or disease of the insured for which disability is claimed? Disability following complications of appendicitis operation.

5. (a) What was the condition of health of the Insured for the year preceding the date of the present disability? Yes.

(b) When did the illness begin which led up to Insured's present disability? Dec. 13, 1930.

(c) When did Insured first consult a physician in connection therewith? Dec. 14, 1930.

(d) From what date has he been prevented, by reason of his disability from engaging in any occupation whatsoever for remuneration or profit? Dec. 13, 1930.

(e) Give full particulars and the names and addresses of all physicians consulted? Dr. N. R. Currie, Jackson, Miss. Dr. H. R. Shands, Jackson, Miss.

6. Give your opinion as to whether or not the Insured will be permanently, continuously and wholly prevented thereby for life from pursuing any and all gainful occupations by reason of his disability? Do not think so.

7. After careful examination to what extent do you find Insured disabled and due to what cause? Applicant able to be up and about every day—BP 120—80, in my opinion able to attend to duties not requiring hard labor or excessive exertion. Has gained weight and a great deal stronger. His physician has advised not to work.

Examiner's Signature: J. C. Huggins, M. D.

[fol. 125] Dated at 6/24 1931.

That from said report the defendant's agents and officers being of the opinion that the plaintiff was not totally and permanently disabled within the meaning of the policies in question, upon July 6, 1931, wrote to the plaintiff declining the payment of further disability claims on the policies in question, said letter being in words and figures as follows, to-wit:

Exhibit—Letter, F. S. Lantry, Chairman to Roy T. Mobley, dated 7/6/31 (same as Exhibit No. 3), omitted from the printed record, being heretofore copied at page 72.

* * * * * * *

That upon July 11, 1931, the plaintiff wrote to W. Y. Guilbert, defendant's special agent at Jackson, Mississippi, a

certain letter marked Exhibit 4 to the plaintiff's said replication, which is in words and figures as follows, to-wit:

"Lucedale, Mississippi, July 11, 1931.

Mr. W. Y. Guilbert, c/o New York Life Ins. Co., Branch Office, Tower Building, Jackson, Mississippi

DEAR MR. GUILBERT:

I have just received notice from the Company that they were discontinuing payment of monthly benefits, and that no further premiums would be waived. This was not altogether a surprise to me as I discovered sometime ago that their confidential reports were obtained through parties who knew nothing about my actual condition and made no effort to find out the facts.

[fol. 126] I am as much disabled now as I have been at any time since I got up from the operation, and am therefore instructing my attorney, Mr. Barnett, of Jackson, to file suit against the Company immediately.

I have not been satisfied with the suspicious attitude in which the company has dealt with my case, and its arbitrary action in cutting off my insurance, makes me feel justified in asking that you would return my letter to you in which I set out the benefits of this insurance to me.

I am ready to return to work as soon as I feel able to do so, and in fact have made several attempts to work, I am also ready to return to work when my physicians advise me that it is safe for me to do so.

I fully appreciate your personal service to me in this matter, and upon return of my former letter, if it will benefit you, I will write you another acknowledging your value service and the benefit the insurance received had been to me, but without recommending the Company.

Very truly yours, —— ——."

That upon July 14, 1931, plaintiff again wrote to the defendants special agent Guilbert at Jackson, Mississippi, that certain letter made Exhibit 5 to the plaintiff's said replication, which is in words and figures as follows, to-wit:

Exhibit—Letter, —, to W. Y. Guilbert, dated 7/14/31 (same as Exhibit No. 5), omitted from the printed record, being heretofore copied at page 74.

* * * * * * *

To which letter of the plaintiff, under date of July 14, 1931, the said Guilbert replied under date of July 16, 1931, [fol. 127] which letter is in words and figures as follows, to-wit: the said letter being made Exhibit 6 to the plaintiff's said replication:

Exhibit—Letter, W. Y. Guilbert, Spl. Agent to R. T. Mobley, dated 7/16/31 (same as Exhibit No. 6), omitted from the printed record, being heretofore copied at page 77.

* * * * * * *

That the said Guilbert under date of July 23, 1931, wrote to the plaintiff a certain letter, which is made Exhibit 7 to the plaintiff's said replication, and the said special agent upon the same day and date wrote a letter to C. F. Randall, defendant's cashier, in the Jackson Branch Agency, which is made Exhibit 8 to the plaintiff's said replication the two said letters being in words and figures as follows, to-wit:

Exhibit—Memo. signed WYG to Mr. Mobley (same as Exhibit No. 7), omitted from the printed record, being heretofore copied at page 78.

* * * * * * *

Exhibit—Letter, Special Agent to C. E. Randall, Cashier, dated 7/23/31 (same as Exhibit No. 8), omitted from the printed record, being heretofore copied at page 79.

* * * * * * *

That upon July 21, 1931, defendant's special Agent Guilbert received a letter from Dr. N. R. Currie, of Jackson, Mississippi, plaintiff's physician, which letter was received at the home office by defendant July 28, 1931, which letter [fol. 128] is in words and figures as follows:

"July 21, 1931.

New York Life Insurance Co., Jackson, Mississippi.

Attention Mr. J. Y. Guilbert

This is to certify that I have recently examined Mr. R. T. Mobley and find him still suffering from and extreme nervous condition. He still remains in a- anemic condition. You recall from former statement, that he had, had a gastroenterostomy, and in December, 1930, he had a gangr-nous ap-

pendix. He is still unable to do any kind of work and in my opinion it will be some time before he will be able to do any physical or mental labor.

Yours truly, (Signed) N. R. Currie, M. D."

That upon July 30, 1931, upon the receipt and consideration of the letter from Dr. N. R. Currie dated July 21, 1931, the defendant, through F. S. Lantry, Chairman of its Claims Committee, addressed the following letter to its local examiner in Jackson, Mississippi, Dr. J. C. Huggins, said letter being as follows:

"July 30th, 1931.

Dr. J. C. Huggins, Jackson, Mississippi.

Re Pol. 10,340,538, Claim 64,183-B, Roy T. Mobley, Lucedale, Miss., Born 6-3-02

DEAR DOCTOR:

You will no doubt, recall having examined the above named insured in behalf of the Company a short time ago. [fol. 129] In view of the particulars contained in your report, the Company did not consider the insured any longer wholly disabled and discontinued the payment of benefits.

However, the insured has taken exception to our action, and claims that he is still wholly disabled and unable to engage in any work. In view of the circumstances, we would appreciate it if you would complete another examination, and advise us whether or not there is any change in the insured's conditioin since the time of your last examination. We are of course, particularly interested in having your opinion as to whether or not the insured is capable of engaging in some kind of work.

The usual fee of $3.00 will be allowed. If the examination is made more than three miles from your office an additional fee of $2.00 will be paid for mileage. If, for any reason you are unable to make this examination for us at these terms, please advise us promptly.

A form No. 5 and a stamped addressed envelope are enclosed for your report. Fill in the attached stub and return it to this office for payment.

Very truly yours, F. S. Lantry, Chairman. CB:-ARK.

A memorandum thereof was forwarded by defendant to its Branch Agency in Jackson, Mississippi, the same being in words and figures as follows:

"July 30th, 1931.

Jackson Branch Office.

Re Pol. 10,340,538, Claim 64,193-B, Roy T. Mobley

GENTLEMEN:

Referring to your letter of July 23rd, 1931, with enclosure please advise the insured that in view of the addi- [fol. 130] tional particulars received, the company will be pleased to give further [particulars],* consideration to his claim. Under even date we are writing direct to the Company's examiner, Dr. Huggins, for a report Form 5.

——, Chairman. CB:EK."

Under date of August 17, 1931, the defendant, through Mr. Lantry, its Chairman, wrote Dr. J. C. Huggins, Jackson, Mississippi, a certain letter, in words and figures as follows:

"August 17, 1931.

Dr. J. C. Huggins, Jackson, Miss.

Re R. T. Mobley

DEAR DOCTOR:

Referring to our communication of July 30th, we wrote you concerning the above named insured, and have no record of receiving a reply. Perhaps our letter may have miscarried in the mail or have been mislaid by you. We are therefore enclosing a copy of our letter for your reference and will appreciate a reply, as it will be of material assistance to us in deciding the merits of this case.

Very truly yours, F. S. Lantry, Chairman."

That upon the 3rd of August, 1931, a certain communication took place between defendant's cashier in its Branch Agency, C. E. Randall, and defendant's Special Agent, W. Y. Guilbert, made Exhibit 9 to the plaintiff's said replication, the same being in words and figures as follows:

*[Words in brackets erased in copy.]

Exhibit—Letter, F. S. Lantry, Chairman to W. Y. Guilbert dated 8/3/31, with Memo. signed by W. Y. Guilbert thereon (same as Exhibit No. 9), omitted from the printed [fol. 131] record, being heretofore copied at page 79.

* * * * * * *

That upon August 27th, 1931, Randall, defendant's cashier at the Jackson Branch Agency wrote to the plaintiff a certain letter made Exhibit 10 to the plaintiff's said replication, said letter containing certain enclosures made Exhibits 11 and 12 to the plaintiff's said replication, said communication and enclosure being in words and figures as follows:

Exhibit—Letter, C. R. Randall, Cashier to Roy T. Mobley, dated 8/27/31 (same as Exhibit No. 10).

Exhibit—Blank request to apply dividends left on deposit of reduction of premium and interest, if any (same as Exhibit No. 11).

Exhibit—Blank premium lien note payable to the N. Y. Life Ins. Co., for $4.39, dated 9/7/31 (same as Exhibit No. 12), omitted from the printed record, being heretofore copied at pages 80, 81 and 82.

* * * * * * *

That upon September 23, 1931, the defendant received from its Jackson, Mississippi Branch Agency the report of Dr. J. C. Huggins concerning his re-examination of the plaintiff, which took place August 6, 1931, a copy of which is hereto attached marked "3", said report being as follows:

New York Life Insurance Company

Medical Examiner's Report on Claim for Disability Benefits

1. (a) Name of Insured: Roy T. Mobley.

(b) Approximately: Age, 29; height, 5-8; weight, 160; color of hair, brown; color of eyes, brown.

[fol. 132] 2. Residence: Lucedale, Miss.

3. How well do you know the insured? Casually.

4. What is the nature of the injury, infirmity or disease of the Insured for which disability is claimed?

5. (a) What was the condition of health of the insured for the year preceding the date of the present disability? Says good.

(b) When did the illness begin which led up to Insured's present disability? Dec. 13, 1930.

(c) When did Insured first consult a physician in connection therewith? Dec. 13, 1930.

(d) From what date has he been prevented, by reason of his disability, from engaging in any occupation whatsoever for remuneration or profit? From Dec. 13, 1930.

(e) Give full particulars and the names and addresses of all physicians consulted? Dr. H. R. Shands, Jackson, Miss. Dr. N. R. Currie, Jackson, Miss.

6. Give your opinion as to whether or not the Insured will be permanently, continuously and wholly prevented thereby for life from pursuing any and all gainful occupations by reason of his disability? Do not think so.

7. After careful examination to what extent do you find Insured disabled and due to what cause? Examined Aug. 6th, report made out forward Aug. 7th, I found him at this time able to be up and about—B. P. 130-80, weight good, [fol. 133] but he states that his physician advises him not to work. Think he could do mental work, not exercise.

Examiner's Signature: J. C. Huggins, M. D.

Post Office address, Jackson, Miss. Dated at Aug. 7, 1931.

That upon September 25, 1931, the plaintiff wrote to W. Y. Guilbert a certain letter, made Exhibit 13 to the plaintiff's said replication, the same being in words and figures as follows:

Exhibit—Letter, * * *, to W. Y. Guilbert, dated 9/25/31 (same as Exhibit No. 13) omitted from the printed record, being heretofore copied at page 84.

* * * * * * *

To which letter of September 25th, 1931, the said Randall replied under date of September 26, 1931, said letter

being made Exhibit 14 to the plaintiff's said replication, and being in words and figures as follows:

Letter, C. E. Randall, Cashier to R. T. Mobley, dated 9/26/31 (same as Exhibit No. 14), omitted from the printed record, being heretofore copied at page 85.

* * * * * * *

That not having received a reply to its letter to Dr. Huggins, as aforesaid, on September 2, 1931, the defendant through Mr. F. S. Lantry, Chairman of its Claims Com-
[fol. 134] mittee as aforesaid, addressed a letter to Dr. J. C. Huggins, as follows:

September 2, 1931.

Dr. J. C. Huggins, Jackson, Mississippi.

Re Pol. 10,340,538, Claim 64,183-B, Roy T. Mobley, Lucedale, Miss. Born 6-3-02

DEAR DOCTOR:

In connection with the claim of the above named insured we have just been advised by our Branch Office at Jackson, Mississippi, that you forwarded the form No. 5 on this case to the Home Office on August 7, 1931. However, although we have made a careful search for this report, same has not been located.

Under the circumstances, we will appreciate it very much if you will kindly complete the form No. 5 enclosed and return same to this office.

Thanking you in advance for your kindness and co-operation in the matter, we remain

Very truly yours F. S. Lantry, Chairman. EB: AEK."

That having received no reply thereto upon September 17, 1931, the Chairman, Mr. Lantry, wrote to the said Huggins as follows:

September 17, 1931.

Dr. J. C. Huggins, Jackson, Miss.

Re R. T. Mobley

DEAR DOCTOR:

Referring to our communication of September 2nd, we wrote you concerning the above named insured, and have

[fol. 135] no record of receiving reply. Perhaps our letters may have miscarried in the mail, or has been mislaid by you. We are therefore enclosing a copy of our letter for your reference, and will appreciate a reply as it will be of material assistance to us in deciding the merits of this case.

Very truly yours, F. S. Lantry, Chairman."

That the Company received from Dr. Huggins, report dated August 7, 1931, at its office in New York September 23, 1931, which is filed herewith as No. 3, (said report having been heretofore copied).

That defendant's agents and servants thereupon reconsidered the plaintiff's claim, and determined that he was still totally and permanently disabled within the meaning of the policy sued upon (but defendant does not admit that the proof was conclusive as to the permanentcy of such disability) and thereupon, on October 6, 1931, determined to and did allow the plaintiff all disability claimed from July 13, 1931; that is Jackson Mississippi, Branch Office was so advised by a memorandum from the Home Office dated October 6, 1931, a copy of which is attached hereto and marked No. 4, (hereinbelow copied) as well as by telegram dated October 6, 1931, said memorandum and telegram being in words and figures as follows:

"New York Life Insurance Company

Committee on Disability Claims, F. S. Lantry, Chairman

New York, October 6, 1931.

Jackson Branch Office.

Re Disability Benefits, Policies Nos. 7802419-10340538, R. T. Mobley, Cl. No. 64183-B

[fol. 136] On Reconsideration

1. Statement is enclosed waiving payment of semi-annual premium due July 3, 1931 on Pol. No. 7802419, August 7, 1931 on Pol. No. 10340538.

8. Continuance of monthly income payments has been approved on both pols."

"October 6, 1931.

CRE:HHH.

To Mr. Charles E. Randall, Cashier New York Life Insurance Company, Jackson Tower Building, 127 South Roach Street, Jackson, Mississippi.

AXDFXGDN Mobley.

Claim approved. Check follows.

Committee on Disability Claims."

That in accordance with such determination, the defendant waived premium due July 2, 1931, on the first policy and the premium maturing August 7, 1931, on the second policy, all of which appears from certain written statements made by the defendants, its agents and servants to the plaintiff made Exhibits 15, 16, 17, 18 and 19 to the plaintiff's said replication, in words and figures as follows:

Exhibit—Statement waiving payment of semi-annual premium, dated 10/5/31 for $25.04, due on 7/2/31 (same as Exhibit No. 15), omitted from the printed record, being heretofore copied at page 86.

* * * * * * *

[fol. 137] Exhibit—Letter, E. M. Randall, Cashier to Roy T. Mobley, dated 10/9/31 (same as Exhibit No. 17), omitted from the printed record, being heretofore copied at page 87.

* * * * * * *

Exhibit—Letter, W. W Guilbert, Sp. Agent, to Roy T. Mobley, dated 10/12/31 (same as Exhibit No. 18), omitted from the printed record, being heretofore copied at page 88.

* * * * * * *

Exhibit—Letter, C. E. Randall, Cashier, to Roy T. Mobley, dated 10/31/31 (same as Exhibit No. 19), omitted from the printed record, being heretofore copied at page 89.

* * * * * * *

That the defendant thereupon continued to pay plaintiff's monthly disability claims on the policies in question up to and including the disability payment maturing February 13, 1932. That upon February 24, 1932, the plaintiff re-submitted himself to the defendant's examiner, Dr. J. C. Huggins, at Jackson, Mississippi, and Doctor Huggins' report was received at the Home Office of the defendant February 29, 1931, a copy of which is hereto attached marked No. 5.

Said report being as follows, to-wit:

"New York Life Insurance Company

Medical Examiner's Report on Claim for Disability Benefits

1. (a) Name of Insured: Roy T. Mobley.

[fol. 138] (b) Approximately: Age, 29; height, 5' 8"; weight, 160; color of hair, brown; color of eyes, blue.

2. Residence: Jackson, Miss.

3. How well do you know Insured? Casually.

4. What is the nature of the injury, infirmity or disease of the Insured for which disability is claimed? Operation for appendicitis and complications following.

5. (a) What was the condition of the Insured for the year preceding the date of the present disability? Good.

(b) When did the illness begin which led up to Insured's present disability? Dec. 13, 1930.

(c) When did Insured first consult a physician in connection therewith? Dec. 14, 1930.

(d) From what date has he been prevented, by reason of his disability, from engaging in any occupation whatsoever for remuneration or profit? Dec. 13, 1930.

(e) Give full particulars and the names and addresses of all physicians consulted? Dr. N. R. Currie, Jackson, Miss. Dr. H. R. Shands, Jackson, Miss.

6. Give your opinion as to whether or not the Insured will be permanently, continuously and wholly prevented thereby

for life from pursuing any and all gainful occupation by reason of his disability? No.

7. After careful examination to what extent to you find Insured disabled and due to what cause? B. P. 128-80, pulse 76, heart action good—appears to be able to do some [fol. 139] work as mental, says he is not working because his physician said he had low blood pressure. I find it good. Do not find him disabled from some work.

Examiner's Signature: J. C. Huggins, M. D.

Dated at Jackson 2/2/1932. Post Office Address, Jackson, Miss.

Received Feb. 26, 1932, Jackson Branch.

That the defendant sent to the plaintiff notice of premium maturing on the 7th day of February, 1932, on Policy No. 10,340,538 and a reminder notice thereof under date of March 3, 1931, which notices are made Exhibits 20 and 21 to the plaintiff's said replication, being in words and figures as follows:

Exhibit—Notice sent to Roy T. Mobley of amount premium due $66.35, date due 2/7/32 (same as Exhibit No. 20).

Exhibit—Reminder sent to Roy T. Mobley of amount of premium due $66.35, date due 2/7/33 (same as Exhibit No. 21), omitted from the printed record, being heretofore copied at pages 90 and 91.

* * * * * * *

That between the 24th day of February, 1932, and the 19th day of March, 1932, the defendant re-examined the plaintiff's disability claim, and, based upon the conclusions drawn by defendants from contents stated of the report of Dr. Huggins, decided to discontinue disability payments, and accordingly, the defendant through F. S. Lantry, Chairman, on March 19, 1932, wrote the plaintiff that cer- [fol. 140] tain letter made Exhibit 22 to the plaintiff's said replication, which is in words and figures as follows:

Exhibit—Letter F. S. Lantry, Chairman, to Roy T. Mobley, dated 3/19/32 (same as Exhibit No. 22), omitted from the printed record, being heretofore copied at page 92.

* * * * * * *

That under date of April 7, 1932, defendant's cashier in its Jackson, Mississippi Branch Office wrote to plaintiff that certain letter made Exhibit 24 to the plaintiff's said replication which is in words and figures as follows:

Exhibit—Letter, C. C. Randall, Cashier, to Roy T. Mobley, dated 4/7/32 (same as Exhibit No. 24), omitted from the printed record, being heretofore copied at page 94.

* * * * * * *

Upon April 20, 1932, defendant, through its Chairman, wrote to the plaintiff a certain letter made Exhibit 23 to the plaintiff's said replication, in words and figures as follows:

Exhibit—Letter, F. S. Lantry, Chairman, to Roy T. Mobley, dated 4/20/32 (same as Exhibit No. 23), omitted from the printed record, being heretofore copied at page 93.

* * * * * * *

That upon April 20, 1932, the defendant, for the purpose of reconsidering the plaintiff's claim, wrote to Dr. Law-
[fol. 141] rence W. Long, a competent and reputable physician, of Jackson, Mississippi, a certain letter, which is in words and figures as follows:

"April 20th, 1932.

Dr. Lawrence W. Long, 514 East Capital St., Jackson, Miss.

Re Claim No. 64,183-B Pol. 10,340,538, etc., Roy T. Mobley, 535 Valley St., Jackson, Miss.

Dear Doctor:

We have under consideration the question of continuing the payment of benefits to the above named insured. We wish to advise that information recently received indicated that he was no longer totally disabled and unable to engage in any remunerative work, and we, therefore, discontinued the payment of benefits. The insured, however, has taken exception to our action, and contends that he is still totally disabled.

In view of the circumstances, we will appreciate it if you will complete an examination, advise us of your findings, and let us have your opinion as to whether or not this insured is capable of engaging in some work. The usual fee of $3.00 will be allowed. If examination is made more than three miles from your office an additional fee of $3.00 will be paid for mileage. If for any reason you are unable to make this examination for us under these terms, please advise us promptly. A stamped addressed envelope and a form No. 5 are enclosed for your report. Please fill in the attached stub and return same to this office for payment.

Yours truly, F. S. Lantry, Chairman B. CB:SN.

[fol. 142] That upon the 2nd day of May, 1932, defendant received from Dr. Long the following report, which is attached hereto and marked No. 6.

New York Life Insurance Company

Medical Examiner's Report on Claim for Disability Benefits

1. (a) Name of Insured: Roy T. Mobley, No. 64,183-B.

(b) Approximately: Age, height, weight, color of hair, color of eyes.

2. Residence: 535 Valley Street, call made to that location, and had moved to 939 No. Congress St.

3. How well do you know Insured?

4. What is the nature of the injury, infirmity or disease of the Insured for which disability is claimed? And on checking that address I find that he has returned to Leakesville, Miss., and is not in this city at present—if so, after two attempts we are unable to locate him. Referring to letter of April 20th, 1932. L. W. Long, M. D.

Examiner's Signature: L. W. Long, M. D.

Post Office Address, Jackson, Miss.
Dated at 4-28-1932.

The defendant learned that the plaintiff had removed to Lucedale, Mississippi, and upon May 4, 1932, for the purpose of continuing its investigation of the plaintiff's claim, wrote a letter to Dr. James A. Dorsett, said to be a

[fol. 143] competent and reputable physician, at Lucedale, Mississippi, which letter is in words and figures as follows:

"May 4th, 1932.

Dr. James A. Dorsett, Lucedale, Miss.

Re Claim No. 64,183-B, Pol. 10,340,419, etc., Roy T. Mobley, Lucedale, Miss.

Dear Doctor:

We have under consideration the question of continuing the payment of benefits to the above named insured. We wish to advise that information recently received indicated that he was no longer totally disabled and unable to engage in any remunerative work, and we, therefore, discontinued the payment of benefits. The insured however, has taken exception to our action, and contends that he is still totally disabled.

In view of the circumstances, we will appreciate it if you will complete an examination, advise us of your findings, and let us have your opinion as to whether or not this insured is capable of engaging in some work.

The usual fee of $3.00 will be allowed. If examination is made more than three miles from your office an additional fee of $2.00 will be paid for mileage. If for any reason you are unable to make this examination for us under these terms advise us promptly.

A stamped addressed envelope and a form No. 5 are enclosed for your report—Please fill in the attached stub and return same to this office for payment.

Yours truly, F. S. Lantry, Chairman, Bule. CB:SN."

That in the meantime it received from Dr. J. E. Beck of Mobile, Alabama, a competent and qualified physician and [fol. 144] surgeon, a letter concerning the plaintiff's condition, dated May 4, 1932, which is in words and figures as follows:

"May 4, 1932.

New York Life Insurance Co., New York.

Re Claim No. 64,183-B, Pol. 7,802,419-10,340,538

Gentlemen:

Referring to Mr. R. T. Mobley. His blood pressure today is 130/100, which I interpret as indicating myocardial insufficiency.

Radiographic examination about April 1st, 1932 showed hypermotility of the stomach and intestines, patent gastroenterostomy opening, but the greater percentage of the barium meal passing through the pylorus.

He has extreme hyperacidity about ½ to 1 hour after eating, followed by extreme lassitude.

Riding upon a train or in any automobile has frequently caused vomiting the last year.

Whether or not the myocardial insufficiency is primarily organic or is functional and a complication of his extended period of gastrointestinal disorder I am unable to state.

For treatment I have urged him to remain in bed several hours each day and restrict his diet to the list furnished him.

He is totally disabled at present and the date of his restoration to health is uncertain.

Very respectfully, J. E. Beck, M. C."

That upon the 12th day of May, 1932, the plaintiff having submitted himself for examination to Dr. J. A. Dorsett, of Lucedale, Mississippi, a report upon the plaintiff's con- [fol. 145] dition was made by Dr. J. A. Dorsett, a copy of which is hereto attached, marked No. "7".

New York Life Insurance Company

Medical Examiner's Report on Claim for Disability Benefits

1. (a) Name of Insured: Roy T. Mobley.

(b) Approximately: Age, 30; height, 5-8; weight, 156; color of hair, dark; color of eyes, blue.

2. Residence: Lucedale, Miss., at present.

3. How well do you know Insured? Real well for past three years.

4. What is the nature of the injury, infirmity or disease of the Insured for which disability is claimed? Myocardial insufficient or some of its kindred symptoms, pulse ratio sitting 90.

5. (a) What was the condition of health of the Insured for the year, preceding the date of the present disability? Very good.

(b) When did the illness begin which led up to Insured's present disability? 1930, Dec.

(c) When did Insured first consult a physician in connection therewith? Dec. 14, 1930.

(d) From what date has he been prevented, by reason of his disability, from engaging in any occupation whatsoever for remuneration or profit? Dec. 12, 1930.

[fol. 146] (e) Give full particulars and the names and addresses of all physicians consulted? Dr. N. R. Currie, Jackson, Miss., Dr. H. R. Shands, Jackson, Dr. J. E. Beck, Mobile, Ala.

6. Give your opinion as to whether or not the insured will be permanently continuously and wholly prevented thereby for life from pursuing any and all gainful occupations by reason of his disability? At present he is disabled from work, but for how long, he will be, I cannot say.

7. After careful examination to what extent do you find Insured disabled and due to what cause? Total disabled at present—his heart.

Examiner's Signature: J. A. Dorsett.

Post Office Address, Lucedale, Miss.
Dated at Lucedale, Miss., 1932.

That upon May 16, 1932, the plaintiff wrote to the defendant's Branch Office a letter, in words and figures as follows:

"Lucedale, Miss., May 16, 1932.

New York Life Ins. Co., Branch Office, Jackson, Miss.

GENTLEMEN:

Unless I can get a decision on resumption of my disability benefits by the end of this week, I will have to enter suit in the Circuit Court of George County.

Very truly yours, R. T. Mobley."

[fol. 147] That upon May 18, 1932, the Cashier of defendant's Branch Agency wrote to the plaintiff that certain letter made Exhibit 25 to the plaintiff's said re[illegible]tion, in words and figures as follows:

Exhibit—Letter, C. E. Randall, Cashier, to Roy T. Mobley, dated 5/18/32 (same as Exhibit No. 25), omitted from the printed record, being heretofore copied at page 94.

* * * * * * * *

That on and prior to May 21, 1932, the defendant having reconsidered the plaintiff's claim for disabilities determined to continue the same, and upon May 21, 1932, sent a telegram to its Branch Agency at Jackson, Mississippi, in words and figures as follows:

"May 21st, 1932.

Mr. Charles E. Randall, Cashier, New York Life Ins. Co., Jackson Tower, Bldg., 127 S. Roach St., Jackson, Miss.:

Advise Roy Robley claim approved. Check and waiver statement following.

Comm. on Disability Claims. Mc:AK."

That on the same date it sent to its Branch Agency at Jackson, Mississippi, a memorandum allowing the plaintiff's disability claim and waiving premiums upon said policies, and each of them, a copy of which is attached hereto marked No. "8". Said memorandum being hereinbelow copied.

[fol. 148] New York Life Insurance Company

Jackson Branch Office

New York, May 21, 1932.

Claim No. 64,183-B

LRF.

1. On reconsideration statement is enclosed waiving payment of semi-annual premium due July 9, 1932, on pol. 7,802,419.

7. Monthly disability income payments have been approved beginning with the payment due March 13, 1932, on both pols.

That upon May 21, 1932, after sending the telegram to its Branch [agency on May 21, 1932, it receive]* office dated May 21, 1932, appears the following indorsement:

*[Words in brackets erased in copy.]

"This approval was before receipt of assured's letter of May 16th."

That upon May 21, 1932, after sending the telegram to its Branch Agency on May 21, 1932, it received plaintiff's letter of May 16, 1932, made Exhibit 25 to plaintiff's said replication as aforesaid.

That upon July 17, 1932, plaintiff wrote to defendant's Branch Agency, received by it upon July 19, 1932, a certain letter, in words and figures as follows:

"Lucedale, Miss., July 17, 1932.

New York Life Ins. Co., Branch Office, Jackson, Miss.

In re Pol. No. 10,340,538

GENTLEMEN:

I am in receipt of premium notice for August 7th. As I am still disabled please send me waiver of this premium. [fol. 149] Please do not delay this matter unnecessarily.

Very truly yours, R. T. Mobley."

That upon December 17, 1932, the plaintiff wrote to the defendant at its Home Office in New York a certain letter, received by it upon December 20, 1932, which is in words and figures as follows:

"R. T. Mobley,

927 Inge St., Jackson, Miss.

Dec. 17, 1932.

New York Life Insurance Company, 51 Madison Avenue, Madison Square, New York, N. Y.

Re R. T. Mobley, Pols. 7,802,419, Disability Benefits

GENTLEMEN:

I have not received my disability benefit due December 13, 1932. Your Branch Office here can give no reason for the delay. I have a wife and a three year old baby, besides myself, who are absolutely dependent upon this insurance, and I must know by return mail what I am to expect in regard to the payment of this benefit. My condition and

circumstances are such that I cannot wait more than a few days longer for definite information from you about this matter. Please do me the courtesy of giving me this information by return mail.

Very truly yours, R. T. Mobley, 927 Inge St., Jackson, Mississippi."

[fol. 150] That upon December 27, 1932, the defendant wrote to the plaintiff a certain letter, being Exhibit 27 to the plaintiff's said replication, which is in words and figures as follows:

Exhibit—Letter, Frank S. Lantry, Chairman, to R. T. Mobley, dated 12/27/32 (same as Exhibit No. 27), omitted from the printed record, being heretofore copied at page 96.

* * * * * * * *

That up to February 13, 1933, the defendant had paid to the plaintiff the disability claims previously maturing on said policies, and each of them and waived payment of the premiums maturing upon said policies, which would keep the insurance in force on the first policy until the 9 day of August, 1933, and on the second policy to the 7 day of March, 1933.

(3) That upon the 3rd day of January, 1933, it received from one of its confidential inspectors at Jackson, Mississippi, a report upon the assured, copy of which is hereto attached No. "9". Said report being hereinbelow copied as follows:

New York Life Insurance Co.

Office at New Orleans, La.

(Date:) 12-22-32.

Report on Roy T. Mobley, Age 30, Local Address Lucedale, Miss., formerly—now Jackson, Miss.

Serial No. 22,241, Claim No. 64,183-B. We enclose fee of Pol. 10,340,538, $50c, by Check No. A 57,114.

1. How long have you personally known him? About 7 years—were classmates in law school.

[fol. 151] (b) Or, about how long have your informants known him?

(c) About how long since your or your informants have seen him or heard directly of him? Have not seen him for several months, talked to him on phone today.

2. (a) Is he now sick or ailing? Apparently.

(b) What is nature of his sickness? Have not been able to determine—see note.

(c) What physicians are attending him? Dr. E. A. Copeland, Jackson.

(d) At what sanitariums or hospitals, if any, has he received treatment? Do not know.

3. (a) Has he resumed working? No.

4. (a) Is he confined to bed? No.

(b) If not, is he confined to his home? Not necessarily—see note.

5. To what extent is he able to do ordinary things? How does he spend his time during the day? What are his activities, forms of recreation or amusement? It has been difficult to get any information regarding this assured. He apparently stays at home all or most of the time, although several informants have reported seeing him on the streets recently. He told me today he had never recovered from an operation for appendicitis. He has told other parties that he had stomach trouble or high blood pressure—Several informants frankly state that in their opinion his trouble is too much insurance.

[fol. 152] 6. If not working, about how soon do you think he will be able to? Could probably work now.

7. If not working, but you think he could if he wanted to, please give your reasons for this opinion. He recently "sat-in" on the trial of a law suit at New Augusta, although he did not actively try it. The nature of his work has always been confining and every report I got is to the effect that he could still do this work if he had an opportunity.

[W. H. Watkins, Jr.]*

Date 12-29-32.

[*Signature erased in copy.]

Following such communications, upon January 19, 1933, the defendant wrote to the plaintiff as follows, said letter being Exhibit 28 to the plaintiff's replication, said letter being in words and figures as follows:

Exhibit—Letter Frank S. Lantry, Chairman, to Roy T. Mobley, dated 1/19/33 (same as Exhibit No. 28), omitted from the printed record, being heretofore copied at page 96.

* * * * * * * *

That upon January 26, 1933, the defendant at New York City, New York, received from the plaintiff the blank requested to be filled out, which is made Exhibit 29 to the plaintiff's said replication, copy of which is hereto attached, marked No. "10", same being as follows, to-wit:

Application to New York Life Insurance Company for Continuance of Disability Benefits under Policy Number 10,340,538

1. Full name of Insured: Roy T. Mobley.

[fol. 153] 2. Have you resumed working? No.

3. If not, are your prevented from working solely because of bodily injury or disease? (State facts briefly.) Yes.

4. Have you attempted to do any work since the date disability began? (If so, state facts.) No.

5. Are you confined to bed? Partially.

6. Are you confined to the house, hospital or a sanitarium? (If so, state which and how long so confined.) My condition keeps me in the house most of the time.

7. To what extent are you able to be out of doors? No definite period.

8. Describe your daily activities briefly. Get up 10 A. M. to noon, sit in chair or lie on day bed, reading, listening to radio or doing nothing until bed time 10 P. M., eat noon & 6 P. M., go out when absolutely necessary, occasionally take short walk or ride in late afternoon for health. Sleep fitfully.

9. If not working, when do you expect to be able to resume work? See back.

10. How often is it necessary for you to consult a physician? As often as I can afford.

11. When did you last consult a physician? (Give name and address of last physician consulted.) Dr. J. E. Beck, Mobile, Ala. in November, 1932.

12. From what Companies or associations are you now receiving disability benefits? (State amount of benefits re-[fol. 154] ceive monthly from each). Only New York Life —$70 per month.

13. Has any Company or Association discontinued payment of benefits? One month you cut me off and the next you suspend my benefits.

Signature of Insured: Roy T. Mobley.
Present Address, 927 Inge Street, Jackson, Mississippi.

Sworn to before me this 24th day of January, 1933.
Marie Bourgeois, Notary Public. (Seal.)

(Received Jan. 26, 1933, Home Office.)

I have been disabled for more than two years without any notic-able improvement in my condition. I no longer entertain any hope of being able to return to active practice of the law. Whenever I attempt any kind of exercise, mental or physical, there is an immediate and rapid deterioration of my physical and nervous system. My doctors have advised me to take as much exercise as I feel able to do, but as yet I have been unable to find any kind of exercise which I could repeat each day without injury myself.

My problem is a two-fold one of first rebuilding my health to the point where I can do a sufficient amount of physical exercise regularly and second to find some means of livelihood which will require a minimum of physical action and which at the same time will not overstrain my nervous system.

I am doing the best I can to rehabilitate myself, and would appreciate it if you would spend some time trying to help me do so rather than worrying me with a constant stream of investigations.

Roy T. Mobley.

[fol. 155] That on or about the 24th day of January, 1933, it requested Dr. Huggins, of Jackson, Mississippi, to make

a further and additional report on the plaintiff; that the copy of the report made by Dr. Huggins in response to said request is hereto attached, marked No. "11", and same is hereinbelow copied as follows, to-wit:

New York Life Insurance Company

Medical Examiner's Report on Claim for Disability Benefits

1. (a) Name of Insured: Roy T. Mobley.

(b) Approximately: Age, 30; height, 5' 8"; weight, 155; color of hair, brown; color of eyes, blue.

2. Residence? Jackson, Miss.

3. How well do you know Insured? Casually.

4. What is the nature of the injury, infirmity or disease of the Insured for which disability is claimed? Appendicitis operation, heart trouble.

5. (a) What was the conditioin of health of the Insured for the year preceding the date of the present disability? Good.

(b) When did the illness begin which led up to Insured's present disability? Dec. 13, 1930.

(c) When did Insured first consult a physician in connection therewith? Dec. 14, 1930.

(d) From what date has he been prevented, by reason of his disability from engaging in any occupation whatso- [fol. 156] ever for remuneration or profit? Since Dec. 13, 1930.

(e) Give full particulars and the names and addresses of all physicians consulted? Dr. N. R. Currie, Jackson, Miss.; Dr. H. R. Shands, Jackson, Miss.; Dr. Beck, Mobile, Alabama.

6. Give your opinion as to whether or not the Insured will be permanently, continuously and wholly prevented thereby for life from pursuing any and all gainful occupations by reason of his disability. Should be able to do some clerical or mental work.

7. After careful examination to what extent do you find Insured disabled and due to what cause? Low blood pres-

sure, complains of indigestion, complains of no energy, weakness. Dr. Beck in Mobile advised him Nov. 1932 not to do any work of any nature, says diagnosis heart trouble.

Examiner's Signature: J. C. Huggins, M. C.

Post Office address, Jackson, Miss.

B. Ps., 140.
D. 85, Anemic.

Dated at 1-26-1933.

That upon February 8, 1933, the defendant wrote to Dr. Huggins, of Jackson, Mississippi, for additional information. The original letter was returned to the defendant by Dr. Huggins with reply thereupon, received by defendant [fol. 157] February 24, 1933, which said letters are in words and figures as follows:

"February 8, 1933.

Dr. J. C. Huggins, 235 N. Capital Street, Jackson, Mississippi.

Re Claim No. 64,183-B, Policy No. 10,340,538, Roy T. Mobley, Jackson, Miss.

Dear Doctor:

You will no doubt recall having examined the above named insured for us on January 26, and as we are in need of further information it will be appreciate- if you will kindly furnish us with same.

We are particularly interested in learning if at the time you examined Mr. Mobley, you considered him totally disabled and prevented thereby from performing any work, from following any occupation or from engaging in any business whatsoever for remuneration or profit. It will also be appreciated if you will kindly advise whether the assured's condition is such that he could perform some work, not necessarily the same type of work, or the same amount of work, that he was accustomed to doing prior to the onset of his illness.

We are enclosing a stamped addressed envelope for your convenience in reply.

Yours very truly, Frank S. Lantry, Chairman.

In reference to Mr. Mobley—I feel that he could be doing some work—not of the same type or amount, but some [fol. 158] clerical work that would not tax him—I do not see where it would make his condition any worse. His physical condition is not such that he is unable to do anything—however, I do not think he could follow any occupation requiring mental or physical strain.

Yours very truly, J. C. Huggins."

That upon February 22, 1933, plaintiff wrote to the defendant a certain letter made Exhibit 30 to the plaintiff's said replication, received by the Defendant February 27, 1933, which said letter is in words and figures as follows:

Exhibit—Letter, Roy T. Mobley, to N. Y. Life Ins. Co., dated 2/22/33 (same as Exhibit No. 30), omitted from the printed record, being heretofore copied at page 99.

. . . . . .

That the plaintiff again wrote the defendant upon February 28, 1933, which letter is made Exhibit 31 to the plaintiff's said replication, and is in words and figures as follows:

Exhibit—Letter, R. T. Mobley, to N. Y. Life Ins. Co., dated 2/28/33 (same as Exhibit No. 31), omitted from the printed record, being heretofore copied at page 100.

. . . . . .

[fol. 159] That upon March 1, 1933, the defendant wrote to the plaintiff a certain letter, in words and figures as follows:

"Mar. 1, 1933.

Mr. Roy T. Mobley, Jackson, Miss.

Re Claim No. 64,183-B, Pol. No. 10,340,538, etc.

Dear Sir:

Referring to the above numbered policies on which monthly disability income payments have been made up to and including January 13, 1933, inclusive, it appears that

for some time past you have not been continuously totally disabled within the meaning of the Disability Benefit Provision contained in the policies.

In view of this condition, we regret to inform you that no further monthly disability income payments will be made and the premiums due on and after February 7, 1933, became payable i conformity with the terms of the contracts.

Very truly yours, F. T. Lantry, Chairman. HT:W."

That upon March 6, 1933, the plaintiff wrote to the defendant that certain letter made Exhibit 32 to the plaintiff's said replication, which is in words and figures as follows:

Exhibit—Letter, Roy T. Mobley to N. Y. Life Ins. Co., dated 3/6/33 (same as Exhibit No. 32), omitted from the printed record, being heretofore copied at page 101.

* * * * * * *

[fol. 160] That said letter was received by defendant at its Home Office in New York City upon March 9, 1933, and replied to upon the latter named dated by defendant's letter, which is in words and figures as follows:

"March 9, 1933.

Mr. Roy T. Mobley, Lucedale, Miss.

Re Policy 10,340,538, etc., Claim No. 64,185-B

Dear Sir:

We are in receipt of your communication of March 1933, in respect to your above numbered claim. The matter is receiving our attention and we will advise you further within the course of a few days.

Yours very truly, F. S. Lantry, Chairman."

That upon March 9, 1933, plaintiff's attorneys wrote to defendant a certain letter received by it in New York on March 9, 1933, which is in words and figures as follows:

"Gulfport, Mississippi, March 9th, 1933.

New York Life Insurance Company, 51 Madison Avenue, New York, New York.

Re Your policies No. 7802419 and No. 10340538—Roy T. Mobley, Insured

GENTLEMEN:

This is to advise you that we have been employed by Mr. Roy T. Mobley in regard to the foregoing claims which have arisen under the above policies and we contemplate taking immediate legal action unless this matter is satisfactorily settled within the next seven days.

[fol. 161] We have in our possession your letter of March 1st, 1933, addressed to Mr. Mobley in which you deny that he is totally disabled and that you deny any further liability under said policies by virtue of total and permanent disability and that premiums will be due on and after February 7th, 1933.

This is to put you on notice that Mr. Mobley is now totally and permanently disabled and will continue to be so throughout the remainder of his natural life and he refuses to make any payments of premiums on either policy for the reason that you are indebted to him, and for the further reason under the terms of your contract as long as he is disabled there is a waiver of his premiums.

This is to further advise you that since you have breached your contract we now call on you to pay said policies in full for the remainder of his natural expectancy, which is thirty-four years and six months from this date which under the terms of said policies will amount to $28,980.00. We therefore make demand for the payment in full of this claim and will immediately file suit unless the matter is adjusted in the next seven days.

Yours very truly, R. W. Thompson, Jr. RWT:MS."

To which the defendant replied by air mail under date of March 16, 1933, which said letter is in words and figures as follows:

Air Mail

"March 16, 1933.

Mr. R. W. Thompson, Jr., Attorney at Law, 400-408 Hewes Bldg., Gulfport, Mississippi.

Re Roy T. Mobley, Claim No. 64,183-B, Pols. No. 10,340,538-7,802,419

DEAR SIR:

Your letter of March 9, 1933, in regard to the claim of the above named insured has been received and the con- [fol. 162] tents of same has been carefully noted.

We will accordingly review our file on the case and write to you fully, in the course of the next day or two.

Very truly yours, F. S. Lantry, Chairman. KB: NRC."

That on March 17, 1933, defendant wrote to plaintiff's counsel, R. W. Thompson, a certain letter, in words and figures as follows:

"March 17, 1933.

Mr. R. W. Thompson, Attorney at Law, Mize, Thompson & Mize, 400-408 Hewes Bldg., Gulfport, Miss.

Re Roy T. Mobley, Policy No. 10,340,538, etc., Claim No. 64,183-B

DEAR SIR:

Referring further to your letter dated March 9, 1933, concerning the claim of the above named insured, we wish to advise that when the company had under consideration the question of continuing the payment of benefits on the claim after the monthly payment made as of January 13, 1933, information obtained as the result of our customary investigation indicated that the insured has been able to be up and about every day and to all appearances sufficiently recovered to permit him to resume the performance of some remunerative work. Furthermore, the Company's medical examiner in his report of the examination made January 26, 1933, advised that in his opinion the insured is capable of performing some light work of a remunerative nature.

[fol. 163] Under the circumstances since the policy provides, that the payment of disability benefits is subject to the continuance of total disability preventing the insured from performing any work or engaging in any occupation whatsoever for remuneration or profit, the Company in view of these reports could not consider the insured was any longer totally disabled as defined and discontinued the payment of benefits, to which decision we must adhere.

Yours very truly, F. S. Lantry, Chairman. E. J. Burns."

That upon the 13th day of April, 1933, defendant's Branch Agency at Jackson, Mississippi, wrote to the plaintiff a certain communication, made Exhibit 33 to the plaintiff's said replication, which is in words and figures as follows:

"New York Life Insurance Company,

51 Madison Avenue, Madison Square,

New York, N. Y.

Branch Office at Jackson, Miss.

Date: April 13, 1933.

Mr. Roy T. Mobley, Lucedale, Miss.

Policy No. 10,340,538

DEAR SIR:

Your above numbered policy has lapsed for the non-payment of premium. The Company urges you upon receipt of this letter to apply for reinstatement of the policy. Please complete this application for reinstatement printed on the back and have your signature duly witnessed.

[fol. 164] Return the application to me together with $66.35 and 6% interest thereon from the 7th day of February, 1933.

In order to protect your own interest I trust you will give this matter your prompt attention.

Very truly yours, C. W. Cherry, Cashier.

The interest up to April 20th will amount to 78 cents. Please include this interest in your remittance.

P. S.—The attached form No. 224 D is (over) to be executed without expense to the Company by one of the following: J. A. Dorsett and J. W. Horn."

That upon June 5, 1933, the defendant addressed the following communication to the plaintiff concerning Policy No. 10,340,538, which is in words and figures as follows:

"New York Life Insurance Company,

51 Madison Avenue, Madison Square,
New York, N. Y.

June 5, 1933.

Mr. Roy T. Mobley, Lucedale, Mississippi.

DEAR SIR:

Policy No. 10,340,538.
Due date of premium which remains unpaid, 2-7-33.
Insurance automatically continued until 6-20-37.
Amount of continued insurance $5000.00.

Application for re-instatement, after default in payment of the premium specified above, not having been made, notice is hereby given that pursuant to the terms of the [fol. 165] policy the value of the policy has been applied to purchase continued insurance as stated above.

Very truly yours, Arthur Hunter, Vice-President."

That on or about the 9th day of June 1933, the defendant sent to the plaintiff premium notice maturing the 9th day of July, 1933, Policy No. 7,802,419-S7, in words and figures as follows, to-wit:

Please return this notice with your remittance
New York Life Insurance Company

Home Office, 51 Madison Avenue, Madison Square,
New York, N. Y.

hereby gives notice that a payment will be due as specified below provided the policy is then in force.

Amount due, Premium $25.04.
Policy Number 7,802,419.
Date due 9th day of July, year 1933.
Interest on Loan or Note: ——.
Roy T. Mobley, Lucedale, Miss.

Payment must be made to the cashier of the company's Jackson Branch Office, Jackson Tower Bldg., 127 Roach

St., Jackson, Miss., or to the premium cashier at the home office.

Office hours, 9 A. M. to 4 P. M. Saturday, 9 A. M. to 12 M. only.

Unless said payment shall be made to the Company or the duly appointed agent or person authorized to collect [fol. 166] it by or before the date it falls due, said policy and all payments thereon will become forfeited and void except that this notice shall not affect either the period of grace or the right to non forfeiture benefits, if provided for by the statute.

Make payment only in exchange for the Company's official premium receipt signed by the President, and countersigned by the person to whom payment is made. Remittance may be made by bank draft, check, postoffice or express money order, payable to the order of the New York Life Insurance Company, at par at New York or at the place of payment indicated on the face of this notice.

Please notify in writing the office to which you pay your premimus of any error or change in your post-office address, giving the number of each policy you hold.

Thomas A. Buckner, President."

472-N, March 1931.

Page 52 of the agreed statement of facts begins with this letter.

That upon July 8, 1933, plaintiff's counsel wrote to defendant a certain letter received in New York City July 11, 1933, which is in words and figures as follows:

Gulfport, Mississippi, July 8th, 1933.

New York Life Insurance Company, 51 Madison Avenue, Madison Square, New York City.

In re Policy No. 10340538—Roy T. Mobley—Claim No. 64-183-B

GENTLEMEN:

Your letter of June 5th to Mr. Mobley at Lucedale, Mississippi, advising that you had applied the value of the [fol. 167] policy to purchase continued insurance was turned over by him to us for reply.

In reply thereto will state that we wrote you on March 9th, 1933, that Mr. Mobley was totally and permanently disabled and made demand upon you at that time for the value

of the benefits provided by said policy, and you are therefore not authorized to apply the value to purchase continued insurance, and Mr. Mobley does not agree to said application.

We expect to file suit in this matter within the next few days.

Very truly yours, Mize, Thompson & Mize, by S. C. Mize. SCM:MD."

Upon July 12, 1933, defendant wrote to plaintiff's counsel a certain letter in words and figures as follows:

"July 12, 1933.

Mr. S. C. Mize, Mize, Thompson & Mize, Attorneys at Law, 400-408 Hewes Bldg., Gulfport, Miss.

Re Roy T. Mobley, Pol. No. 10,340,538, Claim No. 64,183-B

DEAR SIR:

We have received your letter of July 8th, 1933, and are willing to give further consideration to the question of the above named insured's claim for disability benefits. In that regard will you please furnish us with a statement completed by the assured's attending physician describing his condition since the early part of January, 1933.

[fol. 168] In order that the matter may receive prompt attention we are requesting one of our physicians to call upon the assured for the purpose of a medical examination and he may expect to hear from the Doctor in that regard very shortly.

Yours very truly, F. S. Lantry, Chairman."

That the defendant thereupon on July 17, 1933 addressed to it local examiner at Lucedale, Mississippi, a certain communication, requesting said examiner to re-examine the plaintiff, which said letter is in words and figures as follows:

"July 17, 1933.

Dr. J. A. Dorsett, Lucedale, Mississippi.

Re Claim No. 64,183-R, Pol. 10,340,538, etc., Roy T. Mobley, Lucedale, Miss.

DEAR DOCTOR:

According to information recently received in the course of our consideration of the above named insured's claim

for disability benefits there is considerable doubt as to whether he is still totally disabled and wholly prevented from working.

In view of the circumstances it will be appreciated by the Company if you will examine the Insured and give us a detailed report of his condition together with your opinion as to whether he is totally disabled and the prognosis in the case.

The usual fee of $3.00 will be allowed. If the examination is made more than three miles from your office, an additional fee of $2.00 will be paid for mileage. If for any [fol. 169] reason you are unable to make this examination for us under these terms please advise us promptly.

A stamped addressed envelope and a form No. 5 are enclosed for your report. Please fill in the attached stub and return to this office for payment.

Yours truly, F. S. Lantry, Chairman. ET:KBC."

That the plaintiff submitted himself to re-examination at the hands of Dr. Dorsett upon the morning of July 24, 1933, was re-examined by Dr. Dorsett, the result of which examination was reported to the defendant at its New York Office and received about July 8, 1933, a copy of which report is attached and marked No. "12". Said report being hereinbelow copied as follows, to-wit:

New York Life Insurance Company

Medical Examiner's Report on Claim for Disability Benefits

1. (a) Name of Insured: Roy T. Mobley.

(b) Approximately: Age, 31; height, 5 ft. 8 in.; weight, 160; color of hair, brown; color of eyes, blue.

2. Residence: Lucedale, Miss., at present time.

3. How well do you know Insured? Real well for past two years.

4. What is the nature of the injury, infirmity or disease of the Insured for which disability is claimed? Myocarditis "chronic".

5. (a) What was the condition of health of the Insured for the year preceding the date of the present disability? Good.

[fol. 170] (b) When did the illness begin which led up to Insured's present disability? Dec. 13, 1930.

(c) When did Insured first consult a physician in connection therewith? Dec. 14, 1930.

(d) From what date has he been prevented, by reason of his disability from engaging in any occupation whatsoever for remuneration or profit? Dec. 13, 1930.

(e) Give full particulars and the names and addresses of all physicians consulted? Dr. H. M Shands, Jackson, Miss.; Dr. N. R. Currie, Jackson, Miss.; Dr. J. E. Beck, Mobile, Ala.; Dr. F. S. Gay, Biloxi, Miss.

6. Give your opinion as to whether or not the Insured will be permanently, continuously and wholly prevented thereby for life from pursuing any and all gainful occupations by reason of his disability. It seems from past history and records of such cases that he will be permanently prevented from a strenuous occupation.

7. After careful examination to what extent do you find Insured disabled and due to what cause? The Insured has a slight pallor or appearance, some slight edema not very noticeable upon examination of heart it is some enlarged and upon exertion he develops deponea—all of this was caused evidently—1930 by intestinal intoxication gangrenous appendix, etc.

Examiner's Signature: J. A. Dorsett.

Post Office Address: Lucedale, Miss.
Dated at Lucedale, Miss., 7/24/33.

That upon receipt of said report from its said local examiner, Dr. Dorsett, the defendant addressed to the said [fol. 171] Dr. Dorsett, under date of July 28, 1933, the following letter:

"July 28, 1933.

Dr. J. A. Dorsett, Lucedale, Mississippi.

Re Claim No. 64,183-R. Pols. No. 10,340,538, etc., Roy T. Mob. Lucedale, Miss.

Dear Doctor:

It will be appreciated if you will supplement the form No. 5 which you completed on July 24, 1933, the date on

which you examined the Insured and let me know whether in your opinion he was totally disabled at that time.

Yours truly, F. S. Lantry, Chairman. HT:HRC."

That a response to defendant's letter from Dr. Dorsett under date of August 2, 1933, was received by the Home Office August 5, 1933, said letter from Dr. Dorsett being in words and figures as follows:

"Aug. 2, 1933.

DEAR SIR:

In reply to above question I will say that Roy T. Mobley is not totally disabled from some work, but not able to do hard work & he is not confined to his bed or house.

Yours truly, J. A. Dorsett."

Whereupon the defendant's officers and agents reconsidered plaintiff's claim with the result that on or about the 9th day of August, 1933, defendant's agents and serv-
[fol. 172] ants concluded that the plaintiff continued to be totally and permanently disabled, within the meaning of said policy as hereinbefore set out and accordingly upon August 9th, 1933, it executed and issued and mailed defendant's counsel a notice waiving premiums as to each of the policies in question, the said waiver as to Policy No. 10,340,538 being in words and figures as follows, to-wit:

"No. 189977.

Waiver of Premium Statement

New York Life Insurance Company,

51 Madison Avenue, Madison Square

New York, August 9th, 1933.

To the Holder of Policy No. 10,340,538—R. T. Mobley:

On account of disability of the Insured under the above numbered policy, the New York Life Insurance Company hereby waives payment of the semi-annual premium of $66.35 on said policy, falling due on the 7th day of Feb. and Aug. 1933, but without waiving or otherwise changing any of the terms or conditions of said policy.

This statement shall have no force or effect unless it is countersigned by the Registrar of the Company.

Countersigned by J. W. Behan, Registrar. Thomas A. Buckner, President."

That accompanying said notice waiving payments on each of said policies it mailed to its own counsel disability drafts on the Commercial Bank & Trust Company of New York City, New York, covering all disability payments [fol. 173] under said policies, and each of them accruing from February 13, 1933, and including July 13, 1933, the notice waiving premiums on each of said policies, as well as disability payments were unconditionally tendered to plaintiff's counsel by defendant's counsel, which tender was refused by plaintiff and his counsel, solely on the ground that the defendant was indebted to the plaintiff in the manner and form alleged in the plaintiff's declaration, and that the defendant immediately following the 13th day of each month thereafter tendered to the plaintiff and his counsel the full sum of $50.00 per month covering disability income on the second policy and $20.00 per month on the first policy, up to and including disability claims for February 13, 1934, all of which sums, aggregating $910.00 the defendant has paid into the treasury of this Court; that the defendant has heretofore duly issued and delivered notice of waiver of the premiums accrued upon said policies, and each of them.

That all disability claims under said policies, and each of them accruing since Jan. 13, 1933 have been paid into Court but not including disability claims accruing March 13, 1934, that all premiums maturing on said policies have been waived up to and including the premiums maturing the first policy the 9 day of Jany. 1934, the second policy the 7th day of Feby., 1934.

(4) That the defendant has paid all of the costs of the Court in each of the above entitled causes, including the costs accruing in the State Court prior to removal, up to and including the filing of the pleas in this Court.

(5) That at the hearing of this cause either party may introduce in open Court further and additional evidence as may be relevant, material and competent, not inconsistent with the foregoing agreed statement of facts.

[fol. 174] It is further agreed that the said Roy Mobley has been continuously totally, and permanently disabled, within the meaning of the terms of said policy, since the operation for appendicitis up until the present date, but that the defendant does not admit that he is permanently disabled for the future.

It is further agreed that none of the contants of the confidential reports or the doctors' reports made to the company concerning the plaintiff, were ever made known to the plaintiff at any time before the filing of the law suit herein by him.

It is further agreed that the plaintiff was, at the time of the filing of the suit, and is now, a citizen of the State of Mississippi, and the defendant is a citizen of the State of New York.

It is further agreed that the plaintiff is 32 years old this coming June, 1934.

Mr. Mize objected to the introduction of the letters set out in the agreed statement of facts which were subject to objections for relevancy.

Mr. Mize objected to the introduction of the letter dated July 8, 1933, to the New York Life Insurance Company, upon the ground that it is irrelevant, incompetent, and immaterial, for the reason that the breach had already occurred conclusively, and that no action the company could thereafter take would restore the policy to its——

By Mr. Watkins: Their own letter to us.

By Mr. Mize: But it was long after we had almost implored them to pay the policy, and now it is our contention that this policy had been completely breached, and [fol. 175] that no conduct of theirs after they had reconsidered it and we wrote them what we were going to do—they finally wrote us that after reconsideration of it they adhered to their former decisions, in which they had notified him that they were cutting off his disablity payments, and that on April 15th, when they notified him that the policy had lapsed and become payable, and the only way to do it would be to reinstate it, that there was a complete, total breach of the policy, and that the correspondence set out as follows: Letter of July 8, 1933, from my firm to the New York Life Insurance Company, and the letter dated July 12, 1933, from F. S. Lantry, Chairman——

By the Court: Read it, and I will pass upon it.

By Mr. Mize: I have no objection to reading the letters, so far as that is concerned.

By the Court: Note your objection, and we can bring it up later.

By Mr. Mize: I wanted to get it to the stenographer. I just want it known that I am objecting, and I am willing for the Court to reserve a ruling on it, and read the letters.

By the Court: Very well.

By Mr. Mize: Also object, for the same reasons, to the letter dated July 17, 1933, from the New York Life Insurance Company to Dr. J. A. Dorsett.

[fol. 176] Also object to the report of Dr. Dorsett to the New York Life Insurance Company referred to in Agreed Statement of Facts, as received about July 18, 1933, and which is attached to the Agreed Statement of Facts as Exhibit No. 12.

Object to the letter of Mr. F. S. Lantry, Chairman, to Dr. Dorsett, dated July 28, 1933.

Object to the letter of Dr. J. A. Dorsett dated August 2, 1933, all for the reasons that the contract had been breached by the defendant, and after it had finally and conclusively notified the plaintiff and his attorneys that it had reconsidered the claim and adhered to its former decision to deny any further liability, that there was then a breach of the contract, and any correspondence thereafter was self serving, and irrelevant, incompetent, and immaterial.

By the Court: The Court will reserve the ruling for the present.

Dr. Fred S. Gay was then called as a witness on behalf of the Plaintiff and testified as follows:

My name is Dr. F. S. Gay and my profession is practicing medicine. I have been practicing medicine since 1904, and am duly licensed and authorized to practice under the laws of Mississippi.

I know Roy Mobey and examined him professionally the first time in March, 1933, and have seen him several times since then. I examined him yesterday and it is my opinion that he is totally and permanently disabled for the rest of his life and do not think he will ever be able to engage in any work of any kind whatsoever. He is suffering from chronic myocarditis. If he should have proper treatment, proper

[fol. 177]-rest and relief from worries and financial troubles that would have a tendency to prolong his life. With such treatment he could expect to live practically the normal length of his life. If he were to undertake to do any work he would suffer and it might kill him. He had chronic myocarditis when I first examined him in March, 1933, and has had it ever since. His condition does incapacitate a man from doing some work. His condition does indicate the weakening of the muscles of the heart and the weakening of the muscle structure and would state that he is not able to do any work at present and have never seen one get well, but if a man is free from worry and doesn't exercise too strenuously they live a long time. He would live as long with this condition with no worry or work as long as he would without it, and at the same time not be able to do anything.

Dr. E. A. Copeland was next called as a witness for the plaintiff and testified as follows:

I live at Jackson, Mississippi. Do not have any profession much now but have been practicing just a little bit around among friends since December. I have been disabled from work. I am a duly licensed practitioner under the laws of Mississippi and I practiced some twenty-two years before I was injured.

I know Roy T. Mobley. I examined him professionally and find that he is suffering from Myocarditis. I am sure that he is permanently and totally disabled for the rest of his life.

I practiced medicine in Jackson, Mississippi, and have known Mr. Mobley directly about seven years.

I presented a claim to the New York Life Insurance Company for total and permanent disability in 1931. Mr. Mobley was not my lawyer at that time. Mr. Mobley before his [fol. 178]-operation was my lawyer in another claim. I had a five thousand dollar policy and the company took it over. I filed suit in Perry County and it was removed to the Federal Court at Biloxi and I settled with them for four thousand dollars and surrendered the policy.

Mr. Watkins then asked if at the same time Dr. Copeland did not have policies with three other companies and the question was objected to by Mr. Mize. Mr. Watkins stated he wanted to show his interest and his bias. Mr. Mize

stated that he made no objection to his claim against the New York Life Insurance Company but that the fact he had claims on policies in some other insurance companies, his objection was in this connection that any other life insurance or policies that he held he was objecting to as being irrelevant and immaterial; that it is competent for him to show any controversies that he may have had with the New York Life Insurance Company, as going to his interest, but policies in any other life insurance companies could not throw any light on this case.

The Court stated it would be competent to show his interest and bias and his credibility as a witness, to which exception was taken by Mr. Mize.

I collected disability from four companies altogether, namely the National Life, $25,000.00; Mutual Benefit Health & Accident, $2600.00; New York Life, and a little fraternal insurance with the Mississippi Medical Association $3000.00, making a total of about $40,000.00. I am 49 years old.

He was then asked if he was a candidate for Governor of Mississippi, but stated that he was going to ask the people to elect him Governor but had not publicly announced making a campaign but it was in the newspapers, but am not an active candidate or inactive candidate.

[fol. 179] From 1931 to 1933 I collected practically $40,000.00 for total and permanent disability.

The New York Life Insurance Company that is being sued by Roy Mobley is the same company that I sued and I think Mr. F. S. Lantry was Chairman at that time. They did not pay me before I filed suit. I was making $12,000.00 a year before I was disabled after the accident and I paid for every dollar of this insurance and did not owe them anything.

F. E. Cottrell was next called as a witness for the plaintiff, his testimony being as follows:

I live at Gulfport and my business is Life Insurance. I have been with the Mutual Benefit of New Jersey, Pacific Mutual of Los Angeles. I have in my possession the tables that are usually used by all standard Life Insurance Companies in writing life insurance.

The life expectancy of a man 31 years old 34.63.

The life expectancy of a man 31 years of age was objected to by counsel for defendant on the ground that the tables are only relevant and competent for a man in normal health and never a man suffering from permanent and total disability. The Court stated that could be brought out in the cross-examination.

The book I have is what is known as the American Table and it is calculated the length of life of a person of normal good health.

Q. You say 31. The agreed statement of facts show that Mr. Mobley will be 32 in June. Therefore, you should say 32, should you not, sir, 32 years old?

A. It depends upon whether you take the date—whether you use the age now or the time this contract was in question.

[fol. 180] Q. You are using the age 31?

A. Yes, sir.

By Mr. Mize: That is the age I asked him, on the theory that the breach was made when he was 31.

This table is used by insurance companies to show how long people do live from information gathered over a hundred years, showing how long the average man lives. It has no relation to persons who are totally and permanently disabled.

Motion was thereupon made by Mr. Watkins to exclude and the Court overruled the motion for the reason that the doctor testified that he could live to the length of a normal man, and this testimony is simply permitted to go to the jury for their guidance as to how long a normal man might live, but not to instruct the jury that a man in the condition of the plaintiff would live that long, or that would be an inference.

Exception was taken by Mr. Watkins.

By Mr. Mize: Your Honor, we will ask that the agreed statement of facts may be filed, and I take it that it is not necessary to offer the agreed statement of facts formally in evidence. I think when it is filed with the clerk, that is sufficient; otherwise, I should like to offer it in evidence, with the exception of those letters to which I have heretofore made objections.

By the Court: All right. I might make a ruling on those objections. Is all the testimony in?

[fol. 181] The two original policies, one being No. 7802419 and the other No. 10340538 were then introduced in evidence, said policies being the same policies set out in the original declaration, and are not copied herein for that reason.

A. L. Evans was next called as a witness for the plaintiff, and testified as follows, to-wit:

I live in Gulfport and am engaged as a Certified Public Accountant and am a duly licensed and qualified Certified Public Accountant for the State of Mississippi. I have been a C. P. A. since 1929. I received special training in this line of work. Prior to 1929 was a bookkeeper and had been engaged in that kind of work for approximately ten years working for the Weston Lumber Company at Logtown, Mississippi. I have had experience and occasion to go into various kinds of accountancy work and am familiar with mathematics. I am able to determine the life insurance policy, the present value of same with reference to payments spread out over a period of time. I have been given two policies in favor of Roy T. Mobley with the New York Life Insurance Company to examine. I have been able to determine the value of the two policies and value the two of them at $21,309.84.

Whereupon an objection was made by the attorney for the defendant to the question relative to the value of the policies on the ground of immateriality, irrelevancy and incompetency and the objection was overruled by the Court.

The value of the policies was figured as of March 13, 1933.

[fol. 182] Objection was again made by the attorney for the defendant on the ground that same was immaterial, irrelevant and incompetent.

The amount of interest on the value of the two policies is $1,250.15 and the total amount is $22,559.99.

Defendant again objected on the same ground as hereinbefore set out and the objection was overruled and exception allowed.

Calculation on both of the policies was made at the same time and I have not separated them. Taking his age and the mortality table I figured the value of the two policies. I added to this the present value of the face of the policy. I did not charge the assured with the premium. The present values of the total permanent disabilities is $18,784.84, and the present value of the face of the policies is $2,525.00. This amount was arrived at by taking the present worth of one dollar, compounded at three per cent interest. This was multiplied by the face of the policy.

Q. Do the monthly installments have anything to do with it?

A. It does have in this way: The way we have arrived at that, we have taken the value of one dollar at the beginning, and at the end of each year, in order to establish the average value of the dollar. In other words, the insured would be entitled to $70.00 a month over a period of years, you see.

Q. What does the $70.00 a month have to do with it? How did you figure that into it?

A. We figured that on an average value of one dollar for each year.

Q. Of his expectancy?

A. Of his expectancy, 34.63 years.

Q. How do you arrive at that?

[fol. 183] A. Well, the present value of a dollar, payable at some future date is shown on this table. For instance, we find that the value of a dollar to be compounded at three per cent interest over a period of one year, the present value of that is 970873.79.

The value of a dollar to be paid thirty years from now is 411986.76 and the last payment would be 34½ years which figures 36071415. An annuity of $70.00 per month would cost $18,784.84 compounded at three per cent. I am not a licensed insurance agent. Three per cent compound interest was provided in the policy which was paid on money left with the company and that is the guaranteed rate of interest.

Thereupon the plaintiff rested.

DEFENDANT'S MOTION TO EXCLUDE PLAINTIFF'S EVIDENCE

The attorney for the defendant then made a motion to the Court to exclude all the evidence offered by the plaintiff for the reason that same does not establish or tend to establish any liability upon the part of the defendant, to which motion the Court stated it would reserve the ruling.

J. C. HUGGINS was next called as a witness for the defendant, his testimony being as follows:

My name is J. C. Huggins, I am forty years of age and a physician having graduated from Tulane University. I practice in Jackson, Mississippi and have been practicing for ten years. I am Chief Medical Examiner for the New York Life Insurance Company at Jackson, Mississippi and have held that position since 1926.

I examined Roy T. Mobley on the 26th of January, 1933, at my office in Jackson. I gave him the required physical examination and observation that is required by the company on disability claims.

[fol. 184] Objection was made by attorney for the plaintiff as it was admitted in the record that he was totally and permanently disabled up to the time of the trial, to which objection the Court reserved the ruling.

The trouble from which the plaintiff's doctor testified the plaintiff was suffering is chronic myocarditis and indocarditis. Dr. Copeland stated it was myocarditis and Dr. Beck stated that it was indocarditis and myocarditis. Chronic myocarditis is an inflammation of the heart muscle itself; not necessarily a degeneration of the heart muscle. Indocarditis is an inflammation that may be acute or chronic of the valves and interlining of the heart. I did not find any indication of that trouble when I made the examination in January, 1933. The report dated February 8th, 1933 (hereinbefore copied) stated my best judgment on the matter.

Objection was thereupon made by the plaintiff's attorney on the ground that the statement was in conflict with the agreed statement of facts, but he later withdrew his objection.

I noticed in this record a report of Dr. Dorsett of Leasdale, Mississippi dated July 24, 1933, in which he found chronic heart trouble and chronic heart trouble could develop between the time I examined him and the date Dr. Dorsett examined him. Myocarditis would not prevent the man from doing work of any kind. If the heart muscle was damaged there would probably be no complete recovery but there have been cases that have recovered from myocarditis. A man could do light work that would not require any physical exertion.

Indocarditis is more or less different, do not think a person could be completely cured from indocarditis. Very light work could be done by a person with chronic myocarditis or indocarditis without injury to himself but it would [fol. 185] depend on the stage to which it had reached. I did not have any ill will or dislike for the plaintiff, knew him for a while casually, not intimately and liked him.

I am the company's doctor and think I made about four or five reports to the company and among the first reports I thought he would be able to go to work in about sixty days. I made a report June 24th, 1933; also one August 7th, 1931. On the August 7th, 1931, report I did not state how long he would be disabled, nor on the report of February 24th, 1932, did I state how long I thought he would be disabled. I made a report on the 26th of January. The treatment of myocarditis depends on its severity and the proper treatment of the plaintiff if he had myocarditis was rest. I do not remember if I examined the plaintiff after January 26th, 1933, or not, but my last report shown was my last examination made by him. A man may be totally and temporarily permanently disabled but may afterwards get better and do some light work.

By the Court (interrupting):

Q. Did you say he could be totally and temporarily permanently disabled?

A. No, sir, not permanent. I retract that statement. I didn't catch the permanent. He may be totally disabled temporarily, temporarily totally disabled, and yet regain his ability to do some work gradually, even if it is light work, and at times a man may be temporarily totally disabled, and regain ability to do the same work he was doing before he was disabled.

If a man were suffering from myocarditis and indocarditis I would expect him to lose weight. I did not notice any loss of weight in the plaintiff.

This was objected to by attorney for the plaintiff as not being in rebuttal of anything.

[fol. 186] The next witness called was FRANK S. LANTRY as a witness for the defendant, who testified as follows:

My name is Frank S. Lantry and I live in South Orange, New Jersey, and work for the New York Life Insurance Company. I have been with them a little over 35 years. I am Chairman of the Committee on Disability Claims. I have been Vice-Chairman and Chairman of that Committee since January 1st, 1926. All disability claims pass before my committee. We handle some 16,000 new claims a year and sometimes over 20,000. Claims are passed on in my department to determine whether or not they should be recognized and paid by the Company. There are seven members of my committee. In addition to these there are thirteen or fourteen claim examiners. No one out of the home office has authority to pass on these claims.

Objection was made by plaintiff's attorney with reference to the wish and desire of the Committee stating that self-serving letters show what their desire is.

By Mr. Watkins: I want to show their good faith.

By Mr. Mize: Any self-serving declaration is certainly not competent, and that is what that would be. Just a question of whether they did or did not.

By Mr. Watkins: No, it isn't. Might have made a mistake. That would not make us liable for the maturity of the policy if we made a mistake.

[fol. 187] The Court sustained the objection and exception noted.

By Mr. Watkins:

Q. Please tell the Court in claims of this character, without any reflection upon the plaintiff whatsoever, whether or not there is a very broad or wide opportunity for fictitious claims?

By Mr. Mize: Object to that.

By Mr. Watkins: They are charging us with bad faith. We want to show the only——

By the Court: Do you charge bad faith?

By Mr. Mize: My objection is, if the Court please, it is just a question of breaching the contract, or whether he did not, and the good faith or bad faith is immaterial.

By the Court: The Court will sustain the objection. Just charged with a breach. That is the reason I sustain the objection.

By Mr. Watkins:

. Tell the Court whether or not, in examining claims of this character, there is a border line of claims when it is difficult to tell whether a man is totally and permanently disabled, or not?

By Mr. Mize: Object to that as irrelevant and immaterial. [fol. 188] By Mr. Watkins: I want to show that these were border line cases.

By the Court: Overrule the objection and exception allowed.

By Mr. Watkins:

Tell the Court what is a border line claim?

A. Well, I will reduce it to as few words as possible. It might be a claim in which the Insured had a different idea of the policy from the actual meaning of the terms of the policy. Might be a case involving the question of the Insured's honesty in presenting the claim.

By the Court: It is a doubtful claim?

A. Yes, sir, it is a doubtful claim to us.

Q. Please state to the Court as to whether or not in reviewing that claim if you regarded this as a doubtful claim?

By Mr. Mize: Object to that as irrelevant and immaterial.

A. Yes, sir.

By the Court: Overrule the objection.

By Mr. Mize: Exception.

A. There were periods in which we regarded it as an extremely doubtful claim.

[fol. 189] By Mr. Watkins:

Q. You have examined the report of Dr. Huggins, dated January 26, 1933, as well as the supplementary report of February 8, 1933, have you, sir?

A. Yes, sir.

Q. Tell the Court whether or not there is anything in that report from which your Committee could find that the man was totally and permanently disabled at that time?

By Mr. Mize: Object to that, irrelevant and immaterial, and in contradiction to the agreed statement of facts.

By Mr. Watkins: I am asking him to interpret the doctor's report. Was there anything to show that this man was permanently disabled?

By the Court: I think the report speaks for itself. Sustain the objection.

By Mr. Watkins:

Q. Please tell the Court when the first time was that the company received information that this man was suffering from any chronic heart trouble?

By Mr. Mize: Object to that. The report has been introduced in evidence, and if it was in writing of course the writing——

By the Court: Point it out.

By Mr. Watkins:

Q. When was the first information the company received this man——

[fol. 190] By the Court: I presume he means with reference to the time that you rejected his claim for total and permanent disability.

By Mr. Watkins: I am talking about the date they recognized it and submitted proof for the first time that this man had chronic myocarditis. The first time that information came to the company. I want him to identify it, if he can.

A. The first that any preliminary examination or reports revealed any definite signs of disease of that nature was the report of Dr. Dorsett on July 24, 1933.

By Mr. Mize: Object to that upon the ground that the contract had been breached, and upon the ground that the documents speak for themselves, and are the best evidence.

By the Court: Sustain the objection, so far as that is concerned, but will allow this to be brought out for the information of the Court as to when this information came to them, and not in contradiction of the agreed statement of facts, but simply to point out to the Court when this information came to them, because it is already in the agreed statement of facts. More a matter of argument than it is of testimony.

By Mr. Watkins: It really is, yes, sir. Of course the agreed statement of facts—it is in the agreed statement of facts.

I could not state whether I had any prior information that this man was suffering from chronic myocarditis without refreshing my memory with the file. My recollection is [fol. 191] that there was some statement as to a form of heart trouble. I think there was a report of some myocardial insufficiency which we understood was based on his blood pressure findings. We had not been able to demonstrate that there was any objective signs of a heart condition.

I am not a doctor but perhaps from long acquaintance with those things drop into a language that borders on the medical. We receive in a year approximately 16,000 new claims, and that we have somewhere in the neighborhood of between twenty and twenty-three thousand claims as active claims, in which we are paying. The slowness with which a case is handled depends on the circumstances of the case. Do not give them notice about every six months that they are no longer disabled. I do not recall the name of the doctor who first stated there was a myocardial insufficiency, but I did receive a letter from Dr. J. E. Beck on May 4th, 1932.

Thereupon the defendant rested.

RULING ON OBJECTIONS TO TESTIMONY, ETC.

By the Court: On the objections to the evidence, Mr. Mize has an objection to the defendant's evidence after page 52, I believe it was, in the agreed statement of facts. That objection will be overruled, the exception allowed.

I am not prepared to follow the Rasco case (12 Fed. (2d) 693) but it is not necessary for the Court to decline to follow it at this time because it can easily be distinguished from this case. There was more required of the insured in the Rascoe case than is required of the plaintiff. She was required to submit to periodical examinations, and pay her doctor. In this case the insured was only required to furnish due proof of his total disability. Due proof means [fol. 192] reasonable proof. What is reason proof if not necessary in this case for the Court to decide, because there has been no dispute between the plaintiff and the defendant in that regard. The plaintiff was furnished all proof that was required. According to the plaintiff's contention, under the allegations in his declaration and under the proof, the plaintiff became totally and permanently disabled, made the necessary proof, and the proof was accepted for a while by the insurance company, and then rejected. There was nothing further for the plaintiff to do, except to furnish, upon request, due proof of a continuation of his disability. It was a contract that he had fully performed, and the insurance company owed him the monthly payments so long as he continued to be totally disabled. It being a contract that had been fully performed by the insured, and the insurance company being liable to him for the monthly payments, there was no anticipatory breach of the contract that would render the entire policy due or the present value of it due. Neither do I think that there has been such a repudiation of this policy as would make the defendant liable to the plaintiff for the present cash value of the policy. There is no claim that the policy was invalid from its inception, and as all installments with interest and Court costs have been tendered, the peremptory instruction requested by the defendant should be granted.

To which action of the Court in granting the peremptory instruction the plaintiff excepted before said jury retired, and the exception by the Court was allowed.

Order Approving Bill of Exceptions

The foregoing bill of exceptions is this day examined, approved and allowed as a bill of exceptions in the fore-

going case and within the time as ascertained by the Court and where the testimony is quoted in the form of questions [fol. 193] and answers it is necessary that same be so quoted in order that it might convey the meaning that should be accorded said testimony.

This the 8th day of May, 1934.

E. R. Holmes, United States District Judge.

O. K.; W. H. Watkins.

[File endorsement omitted.]

In United States District Court

No. 998

Roy T. Mobley

vs.

New York Life Insurance Company

Judgment—Filed Feb. 23, 1934.

The jury, having heard the evidence and instructions of the Court, retired and returned the following verdict:

"We, the jury, find for the defendant."

Wherefore, it is ordered and adjudged that the plaintiff have and recover nothing by his suit, but that the same be dismissed; that the plaintiff pay all costs to be taxed in the case subsequent to the filing of defendant's pleas. The clerk of the Court is ordered to turn over to the plaintiff or his counsel of record the sum of $260.00, paid into the treasury of the Court.

Ordered and adjudged this 23rd day of February, A. D. 1934.

[fol. 194] IN UNITED STATES DISTRICT COURT

No. 998

[Title omitted]

MOTION FOR NEW TRIAL—Filed Feb. 27, 1934

Comes the plaintiff, Roy T. Mobley, and moves the Court to set aside the verdict rendered in this cause and grant him a new trial for the following reasons:

1. The Court erred in overruling objections of the plaintiff to the letters that were written after the 15th of April, 1933, as shown by the stenographer's notes.

2. The Court erred in granting a peremptory instruction for the defendant.

3. Other causes to be assigned on the hearing.

S. C. Mize, Attorneys for Plaintiff.

IN UNITED STATES DISTRICT COURT

No. 998

[Title omitted]

ORDER OVERRULING MOTION FOR NEW TRIAL—Filed Feb. 27, 1934

This cause this day came on to be heard on the motion of the plaintiff to set aside the verdict of the jury and judgment rendered therein and grant the plaintiff a new trial, and the Court having heard and considered same is of the opinion that same should be overruled.

It is therefore ordered, adjudged and decreed that said motion be and same is overruled, to which plaintiff excepts in open Court and said exception allowed.

[fol. 195] Upon application of the plaintiff in open Court for sixty days in which to prepare and present a bill of exceptions it is therefore ordered that the plaintiff be and he

is allowed sixty days in which to prepare and file his bill of exceptions.

Ordered, this the 27th day of February, 1934.

E. R. Holmes, Judge.

[File endorsement omitted.]

In United States District Court

No. 1001

Roy T. Mobley

vs.

New York Life Insurance Company

Judgment—Filed Feb. 23, 1934

The jury, having heard the evidence and instructions of the Court, retired and returned the following verdict:

"We the jury, find for the defendant."

Wherefore, it is ordered and adjudged that the plaintiff have and recover nothing by this suit, but that the same be dismissed; that the plaintiff pay all costs to be taxed in the case subsequent to the filing of defendant's pleas. The clerk of the Court is ordered to turn over to the plaintiff or his counsel of record the sum of $780.00, paid into the treasury of the Court.

Ordered and adjudged this 23rd day of February, A. D. 1934.

[fol. 196] In United States District Court

No. 1001

[Title omitted]

Motion for New Trial—Filed Feb. 27, 1934

Comes the plaintiff, Roy T. Mobley and moves the Court to set aside the verdict rendered in this cause and grant him a new trial for the following reasons:

1. The Court erred in overruling objections of the plaintiff to the letters that were written after the 15th of April, 1933, as shown by the stenographers notes.

2. The Court erred in granting a preemptory instruction for the defendant.

3. Other causes to be assigned on the hearing.

S. C. Mize, Attorneys for Plaintiff.

In United States District Court

No. 1001

[Title omitted]

Order Overruling Motion for New Trial—Filed Feb. 27, 1934

This cause this day came on to be heard on the motion of the plaintiff to set aside the verdict of the jury and judgment rendered therein, and grant the plaintiff a new trial, and the Court having heard and considered same is of the opinion that same should be overruled.

It is therefore ordered, adjudged and decreed that said motion be and same is overruled, to which plaintiff excepts in open Court and said exception allowed.

[fol. 197] Upon application of the plaintiff in open court for sixty days in which to prepare and present a bill of exceptions, it is therefore ordered that the plaintiff be and he is allowed sixty days in which to prepare and file his bill of exceptions.

Ordered, this the 27th day of February, 1934.

E. R. Holmes, Judge.

[File endorsement omitted.]

In United States District Court

Consolidated Causes Nos. 998 and 1001, Law

[Title omitted]

Order Granting Extension of Time—Filed April 21, 1934

This cause this day came on to be heard on the petition of the plaintiff R. T. Mobley to be allowed until the 4th of

June, 1934, in which to prepare and have allowed his bill of exceptions, and the Court having considered same it is now ordered by the Court that the plaintiff be granted an extension of time and he be allowed until the 4th of June, 1934, in which to prepare and have allowed his bill of exceptions.

Ordered, this the 18 day of April, 1934.

E. R. Holmes, Judge.

[fol. 198] In United States District Court

Consolidated Causes Nos. 998 and 1001

[Title omitted]

Agreement as to the Records—Filed May 30, 1934

It is hereby agreed by and between the plaintiff and the defendant in making up the record for appeal that the clerk may omit copying the policy of insurance that is filed as Exhibit to the declaration in cause No. 1001, and that said policy is identically the same as the policy in cause No. 998 except as to the date and the amount, and that the clerk may follow the praecipe forwarded by the plaintiff in making up the record in this cause except as changed in this agreement.

It is further agreed that if any parts of the record have been overlooked that the appellant will call the same to be certified to the Circuit Court of Appeals on the request of the appellee.

Witness our signatures this the 23rd day of May, 1934.

Mize, Thompson & Mize, Attorneys for Plaintiff.

Watkins & Eager, Attorneys for Defendant.

[fol. 199] In United States District Court

Consolidated Causes Nos. 998 and 1001, Law

[Title omitted]

Petition for Appeal—Filed May 21, 1934

Roy T. Mobley, the plaintiff in the above styled cause, feeling itself aggrieved by the judgment entered in said

consolidated causes on the 22nd day of February, 1934, hereby petitions the United States District Judge of the Southern Division of the Southern District of Mississippi, the Honorable E. R. Holmes, to allow and grant him an appeal in this cause to the United States Circuit Court of Appeals for the Fifth Circuit, as provided by law, but without supersedeas, for the reasons specifically set out in the assignment of errors herewith filed; and that said appeal may be allowed and the plaintiff authorized to do all things granted to it by such appeal; and that the Clerk be authorized and directed to certify a transcript of the record in said causes, as granted by said appeal, under seal, and to transmit the same to the United States Circuit Court of the United States of America, at its place of convening in the Post Office Building in the City of New Orleans, State of Louisiana.

Roy T. Mobley, Plaintiff. S. C. Mize, Attorneys for for Plaintiff.

[fol. 200] In United States District Court

Consolidated Causes Nos. 998 and 1001, Law

[Title omitted]

Order Allowing Appeal— Filed May 21, 1934

On the hearing of the petition of Roy T. Mobley that he be allowed on appeal in consolidated causes No-. 998 and 1001, Law, and upon consideration, it is now

Ordered that an appeal to the United States Circuit Court of Appeals for the Fifth Circuit from the judgment heretofore rendered in this cause be and the same is hereby allowed, without supersedeas, and that citation be issued and served as provided by law, and that a duly certified transcript of the record pertaining to said judgment and all proceedings connected therewith be forthwith transmitted to said United States Circuit Court of Appeals for the Fifth Circuit, at New Orleans, Louisiana.

It is further ordered, that the amount of the cost bond on appeal be and the same is fixed at five hundred ($500.00) as bond for cost and damages that might be adjudged on account of the said appeal, and the said petitioners now

presenting bond in the sum of five hundred dollars with United States Fidelity & Guaranty Company as surety thereon, it is ordered that the same be and it is hereby duly approved, and that all proceedings, documents and the record and transcript be sent to the United States Circuit Court of Appeals for the Fifth Circuit at New Orleans, Louisiana.

Ordered, this the 15th day of May, 1934.

E. R. Holmes, Judge of the United States District Court for the Southern Division of the Southern District of Mississippi.

[fol. 201] Bond on Appeal for $500.00, approved and filed May 21, 1934, omitted in printing.

[fol. 202] In United States District Court

Consolidated Causes Nos. 998 and 1001, Law

[Title omitted]

Assignment of Errors—Filed May 21, 1934

Comes the plaintiff in error and respectfully says that in the Court below there were errors committed by the Trial Court which are apparent on the face of the record.

1. That the Court erred in overruling the objection of the plaintiff to the introduction of a letter dated July 12th, [fol. 203] 1933, from the New York Life Insurance Company to plaintiff's attorneys to the effect that it had received a letter from plaintiff's attorney of July 8th, 1933, and that the New York Life Insurance Company was willing to give further consideration to the question of plaintiff's claim for further disability benefits because,

(a) Said letter and evidence was a self serving declaration after the defendant had completely and finally breached its contract and had been notified that plaintiff was preparing to file suit on said policy of insurance.

(b) That said letter and evidence was irrelevant, immaterial, and incompetent to the issues before the Court as the policy of insurance had been completely breached.

2. The Court erred in overruling the plaintiffs objection to a letter dated July 17th, 1933, addressed to Dr. J. A. Dorsett from the defendant company because,

(a) Said letter was a self-serving declaration.

(b) Said letter and evidence was hearsay.

(c) Because said letter was irrelevant, immaterial and incompetent to the issues then before the Court as the contract had already been completely breached on the date of the letter and its introduction was an effort on the part of the defendant to build up its defense by hearsay testimony, said letter being in substance to the effect that the company had recently received information that the plaintiff was still entitled to disability benefits and there was considerable doubt in the minds of the company as to whether or not he was totally disabled and requesting the [fol. 204] doctor to make an examination of the insured and give the company a report of his condition.

3. The Court erred in admitting the report of Dr. J. A. Dorsett dated July 24th, 1933, because

(a) Said letter and evidence was hearsay.

(b) Said letter and evidence was irrelevant, immaterial and incompetent to the issues then before the Court because the company had completely breached its contract prior thereto.

4. The Court erred in overruling the objection of the plaintiff to the letter and evidence of F. S. Lantry to Dr. J. A. Dorsett of July 28th, 1933, asking for a further report on the examination of the plaintiff and in overruling the plaintiffs objection to the letter of Dr. Dorsett replying thereto dated August 2nd, 1933, to the effect that said Roy T. Mobley was not totally disabled from some work but was not able to do hard work and was not confined to his bed, because,

(a) Said letters and evidence was hearsay.

(b) Because said letters and evidence was irrelevant, immaterial and incompetent to the issues before the Court as the contract of insurance had been completely breached prior thereto.

5. The Court erred in overruling plaintiffs objection to the introduction of the letter of August 9th, 1933, from Thomas A. Buckner, President of the company to Roy T. Mobley to the effect that the premiums on the policy were waived for the reason that said letter was a self-serving declaration and was irrelevant and immaterial and incom- [fol. 205] petent to the issues before the Court as the policy of insurance had already been completely breached prior thereto, and suit filed on said cause.

The objections made by the plaintiff to all of the above correspondence was taken under advisement by the Court and ruling reserved until the conclusion of the case when the Court overruled same and allowed the exception.

6. The Court erred in overruling the objection of the plaintiff to the question propounded by defendant to its witness Lantry to the effect whether or not in examining claims of this character there is a border line of claims when it is difficult to tell when a man is totally and permanently disabled or not, and in overruling the objection of the plaintiff to the further question to tell the Court what a border line claim was, which question was answered that a border line claim was one in which the insured had a different idea of the policy from the actual meaning of the terms of the policy. It might be a case involving the question of the honesty of claimant in presenting the claim; because said testimony was irrelevant, incompetent and immaterial for the reason the only question before the Court was whether or not the company had breached its contract.

7. The Court erred in overruling the objection of the plaintiff to the testimony of witness Lantry that the claim of plaintiff had been regarded as a doubtful one.

8. The Court erred in giving a peremptory instruction to the jury to find for the defendant because

(a) The defendant company had breached its contract completely and finally before the suit was filed and plaintiff

[fol. 206] did not at any time waive such breach and was entitled to a judgment for the full amount due under the policy.

Respectfully submitted, Roy T. Mobley, by S. C. Mize, Atty.

[File endorsement omitted.]

In United States District Court

[Title omitted]

Prayer for Reversal—Filed May 21, 1934

To the Honorable Circuit Court of Appeals of the United States for the Fifth Circuit, New Orleans, Louisiana:

Now comes the appellant Roy T. Mobley, and prays for a reversal of the judgment of the District Court of the United States, for the Southern Division of the Southern District of Mississippi, in the action brought against said appellee, the defendant, by Roy T. Mobley, the appellant, as plaintiff, which judgment was entered in the office of the Clerk of the District Court of the Southern Division of the Southern District of Mississippi on the 22nd day of February, 1934.

Roy T. Mobley, Appellant. S. C. Mize, Attorneys for Appellant.

[fol. 207] In United States District Court

Consolidated Causes Nos. 998 and 1001, Law

[Title omitted]

Waiver of Service of Citation—Filed May 24, 1934

I, W. H. Watkins, attorney for the New York Life Insurance Company, defendant in the above styled consolidated causes hereby waive service of the citation issued on the 15th of May, 1934, on the appeal from the United States District Court for the Southern Division of the Southern District of Mississippi to the Circuit Court of Appeals for

the Fifth Circuit of the United States, and enter the appearance of the New York Life Insurance Company in the Circuit Court of Appeals as required by said citation.

This the 18 day of May, 1934.

New York Life Ins. Company, by W. H. Watkins, Attorneys for New York Life Ins. Co.

In United States District Court

Law 998 & 1001

[Title omitted]

Præcipe for Record—Filed May 30, 1934

To the Clerk of the Court:

In making up the record in the above styled cause for appeal, you will include the following parts of the record.

First. Caption showing the organization of the Court.

[fol. 208] Second. The Declaration filed by plaintiff in causes No. 998 and No. 1001.

Third. Defendant's first special plea.

Fourth. The defendant's plea of General Issue.

Fifth. The defendant's Notice under the General Issue.

Sixth. The Plaintiff's Replication to the Defendant's Special Plea.

Seventh. The order in minute book 8, page 229, showing consolidation of Causes No. 998 and No. 1001.

Eighth. The Bill of Exceptions.

Ninth. The judgment in Cause No. 998 dismissing Plaintiff's suit which is entered in minute book 8, page 231.

Tenth. The Motion for new trial in Cause No. 998.

Eleventh. The Order overruling the motion for a new trial entered in minute book 8, page 242.

Twelfth. The order entered in Cause No. 1001, dismissing plaintiff's suit recorded in minute book 8, page 232.

Thirteenth. The Motion for a new trial made by plaintiff in Cause No. 1001.

Fourteenth. The order overruling the motion for a new trial in Cause 1001 entered in minute book 8, page 242.

[fol. 209] Fifteenth. The order entered in Causes No.

998 and No. 1001 extending the time in which to prepare and present its bill of exceptions which order is recorded in minute book 8, page 258.

15½. Agreement dated May 23, 1934.
Sixteenth. Petition for Appeal.
Seventeenth. Order allowing Appeal.
Eighteenth. Bond on Appeal.
18½. Assignment of Errors.
Nineteenth. Prayer for Reversal.
Twentieth. This Præcipe.

Mize, Thompson & Mize, Attys. for Plaintiff.

[File endorsement omitted.]

[fol. 210] Clerk's Certificate to foregoing transcript omitted in printing.

RECITAL AS TO CITATION

Citation omitted from the printed record, the original thereof being on file in the office of the Clerk of the U. S. Circuit Court of Appeals.

* * * * * * *

[fol. 211] That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

No. 7469

ROY T. MOBLEY

versus

NEW YORK LIFE INSURANCE CO.

ARGUMENT AND SUBMISSION

Extract from the Minutes of January 8th, 1935

On this day this cause was called, and, after argument by Sidney C. Mize, Esq., for appellant, and William H. Watkins, Esq., for appellee, was submitted to the Court.

[fol. 212] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 7469

(January 16, 1935)

ROY T. MOBLEY, Appellant,

versus

THE NEW YORK LIFE INSURANCE COMPANY, Appellee

Appeal from the District Court of the United States for the Southern District of Mississippi

Before Sibley, Hutcheson and Walker, Circuit Judges

OPINION OF THE COURT—Filed January 16, 1935

SIBLEY, Circuit Judge:

This appeal complains mainly of the instruction by the Court of a verdict for the defendant in the trial of consolidated suits brought by Roy T. Mobley against the New York Life Insurance Company upon two similar policies of life insurance carrying benefits in case of total disability. By the terms of the policies premiums necessary to main-

tain the insurance were due semiannually, but on proof of total disability before the age of sixty subsequent premiums were to be waived and monthly benefits paid so long as the [fol. 213] disability lasted. Proof of continuance of the disability might be demanded not oftener than once a year, and on failure to furnish such proof no future disability payments would be made nor further premiums be waived; but in case of default in payment of premium after total disability the policy might be restored and all benefits paid as if no default had occurred, provided that not more than six months after the default due proof were made of a continuous total disability since the default that would continue for life, or that had continued for three consecutive months. Mobley at the age of thirty-three, while his policies were in force, had an operation for appendicitis with results that totally disabled him, and he collected disability benefits for two years through January, 1933. The Insurance Company on March 1st, 1933, wrote to him: "It appears that for some time past you have not been continuously totally disabled within the meaning of the disability benefit provision contained in the policies. In view of this condition we regret to inform you that no further disability payments will be made, and the premiums due on and after Feb. 7th, 1933, become payable in conformity with the terms of the contracts." Mobley in reply said he was taking immediate legal steps to secure the benefits under the policies. On March 9th the Company wrote that the matter was receiving further attention, and the same day an attorney employed by Mobley wrote the Company demanding payment of $28,980.00 as for a total breach of the insurance contracts and threatening suit. On March 17th the Company wrote the attorney that its medical examiner in January had reported Mobley able to do light work of a remunerative nature, and that he could no longer be considered totally disabled within the definition of the policies, and that payment of benefits had been discontinued, to which decision it would adhere. On April 13th the Com- [fol. 214] pany wrote Mobley that one of the policies had lapsed for non-payment of premium, and urged him to apply for reinstatement to protect his interests. On June 5th it advised him: "Application for reinstatement after default in premium specified above not having been made, notice is hereby given that pursuant to the terms of the

policy the value of the policy has been applied to purchase continued insurance" until June 20, 1937. On June 9th the Company gave notice of the premium falling due July 9th on the other policy. On July 8th Mobley's attorney had written that Mobley did not agree to the action stated in the letter of June 5th, and would sue in a few days. In answer the Company wrote that it was willing to give Mobley's claim for disability benefits further consideration, and asked for a statement from his physician as to his condition since January, and stated that one of its physicians would also call on Mobley to examine him. The examination was made July 24th, and chronic heart disease was found. The Company claimed that this was its first knowledge of the heart trouble. It concluded he was totally disabled and tendered him on August 9th $910.00 accrued benefits, and a written waiver of premiums; but on July 24th suit on one policy had been filed and a few weeks later suit was filed on the other. The Company pleaded the foregoing facts and correspondence and continued the tender with accrued costs. The suits claim a recovery of damages measured by the sum of the disability payments for the life expectancy of Mobley plus the amount that would be due at his death, all reduced to present value, upon the theory of an anticipatory breach of the contracts. The Judge directed that the plea of tender be sustained.

Ordinarily breach of a contract cannot occur until performance is due. In case the promisor prevents performance or disables himself to perform, a right of action at once accrues. In some classes of contracts while executory [fol. 215] on both sides, notably those for personal services and for the purchase or manufacture of goods, or for marriage, a total repudiation of the contract by one party before the time for performance may at the option of the other be treated as a present breach, excusing him from performance on his part and enabling him to sue the repudiator at once for all resulting damages; or he may decline to treat it as a breach and elect to keep the contract in force, tendering performance on his part at the time fixed by the contract and demanding performance of the repudiator. Hochster vs. De la Tour, 2 El. & Bl. 678; Pierce vs. Tennessee Coal & R. R. Co., 173 U. S. 1; Roehm vs. Horst, 178 U. S. 1. This doctrine of an anticipatory breach does not apply to commercial paper or in general to simple prom-

isea to pay money due on an executed consideration. It is said in Kelly vs. Security Mutual Life Ins. Co., 186 N. Y. 16, approved in Killian vs. Metropolitan Life Ins. Co., 251 N. Y. 44, to be confined to contracts to marry, for service, and for goods to be manufactured or delivered, and to have no application to insurance policies. But in Lovell vs. St. Louis Life Ins. Co., 111 U. S. 264, the doctrine was applied to a repudiation by the insurer of an unmatured life insurance contract, but the recovery was measured not by the present worth of the face of the policy but by the amount of premiums paid less the value of the insurance already enjoyed,—now generally called the reserve value of the policy. In Federal Life Ins. Co. vs. Rascoe, 12 Fed. (2d) 693, the doctrine was applied by a divided court to render collectible at once both past and future disability payments as here contended for, and Mobley relies strongly on that case. It has been more conspicuously distinguished and disapproved than followed. In federal courts see Kithcart vs. Metropolitan Life Ins. Co., 1 Fed. Sup. 719; Wyll vs. Pacific Mutual Life Ins. Co., 3 Fed. Sup. 483; Mennsen vs. Travelers Ins. Co., 5 Fed. Sup. 114; Ginsberg vs. Pacific [fol. 216] Mutual Life Ins. Co., 5 Fed. Sup. 296; Hines vs. Fed. Mutual Life Ins. Co., 6 Fed. Sup. 692. It seems opposed in principle to the decision in the Eighth Circuit in Moore vs. Security Trust & Life Ins. Co., 168 Fed. 496, where in effect it is held that while an executory contract of life insurance is capable of anticipatory breach, no contract to pay money is after it has become executed on the part of the promisee. In the State of Tennessee, where Rascoe's policy was made and to be performed, the Supreme Court three years later held that, on a wrongful suspension of a certificate holder, only his annuity benefits in default, and not future instalments, could be recovered. Atkinson vs. R. R. Employees Mutual Relief Society, 22 S. W. (2d) 631. In Mississippi, under the laws of which state the present policy was issued, Rascoe's case has been expressly disapproved. Atlantic Life Ins. Co. vs. Serio, 157 So. 474. That only accrued disability instalments could be recovered had been previously held in Metropolitan Life Ins. Co. vs. Lambert, 157 Miss. 759, 128 So. 750. Similar holdings on instalment insurance benefits have been made in other States, as Woods vs. Provident Life & Accident Ins. Co., 42 S. W. (2d) 499; and Howard vs. Benefit Asso-

ciation of Railway Employees, 39 S. W. (2d) 657, in Kentucky. In Garbush vs. Order of United Commercial Travelers, 228 N. W. 148, the Supreme Court of Minnesota refused to follow Rascoe's case. The Supreme Court of Missouri in Puckett vs. National Annuity Association, — Mo. —, 114 S. W. 1039, held that only benefits past due could be recovered and its Court of Appeals, disapproving the Rascoe case, recently held the same way in Allen vs. National Life & Accident Ins. Co., 67 S. W. (2d) 534; and Chipley vs. National Life & Accident Ins. Co., 67 S. W. (2d) 992. The courts of Texas also refuse recovery for instalments of insurance not due. New York Life Ins. Co. vs. English, 96 Texas 268; State Life Ins. Co. vs. Atkins, [fol. 217] 9 S. W. (2d) 290. Although there is good reason for applying the principle of anticipatory breach to a repudiation of an unmatured policy by the insurer, yet where there is a total or partial maturity of its benefits the insured by a simple suit for what is presently owing can readily establish the status of his contract. If he were allowed a present recovery for all future benefits the calculations on which insurance business is done would be upset, and the purposes for which the benefits were made payable only in instalments would often be defeated. On a War Risk Insurance contract for example it has never been supposed that the insured by winning a contest touching his rights, even when they were totally denied, could recover the present value of future instalments contrary to the very terms of the insurance. Compare United States vs. Worley, Admnx., 281 U. S. 339. Anticipatory breach cannot with this effect be asserted in the present case.

And for another reason there could here be no recovery. In order to — an anticipatory breach of the entire contract there must be a clear and unequivocal repudiation by the promisor of all that remains to be performed, a refusal to be further bound by the contract. Dingley vs. Oler, 117 U. S. 496; Roehm vs. Horst, 178 U. S. 1; Kimel vs. Missouri State Life Ins. Co., 71 Fed. (2d) 921, and cases cited. A reading of the correspondence above set out discloses that at no time did the Insurance Company renounce or repudiate its policies, but founded everything it did upon the terms of them. Even its declaration of lapse and invitation to reinstatement were no repudiation, but in pursuance of their express provisions. All that happened was that

the Company misjudged its obligations. Such an error made in good faith, whether founded in mistake of law or fact, is not repudiation, and does not end a continuing contract, but calls only for its enforcement according to its terms. Mutual Life Ins. Co. vs. March, 56 S. W. (2d) 433; Mas-
[fol. 218] sachusetts Protective Assn. vs. Jurney, 68 S. W. (2d) 455. In this case the Company acknowledged its error and tendered full compensation, together with costs. The insured had no right to anything more.

Judgment affirmed.

[fol. 219] No. 7469

ROY T. MOBLEY

versus

NEW YORK LIFE INSURANCE CO.

JUDGMENT

Extract from the Minutes of January 16th, 1935

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Mississippi, and was argued by counsel;

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

It is further ordered and adjudged that the appellant, Roy T. Mobley, and the surety on the appeal bond herein, United States Fidelity & Guaranty Company, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

[fol. 220] CLERK'S CERTIFICATE

UNITED STATES OF AMERICA:

United States Circuit Court of Appeals, Fifth Circuit

I, Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify

that the pages numbered from 211 to 219 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 7469, wherein Roy T. Mobley is appellant, and The New York Life Insurance Company is appellee, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 210 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 11th day of February, A. D. 1935.

Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals, Fifth Circuit. (Seal United States Court of Appeals, Fifth Circuit.)

[fol. 221] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 1, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 39,379. U. S. Circuit Court of Appeals, Fifth Circuit. Term No. 751. Roy T. Mobley, Petitioner, vs. The New York Life Insurance Company. Petition for a writ of certiorari and exhibit thereto. Filed March 4, 1935. File No. 751, O. T., 1934.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 751

ROY T. MOBLEY,

Petitioner,

vs.

NEW YORK LIFE INSURANCE COMPANY.

PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The petition of Roy T. Mobley respectfully shows unto this Honorable Court:

A.

Summary Statement of Matter Involved.

The matter involved grew out of two suits based on disability benefits under two separate policies issued by the New York Life Insurance Company to the petitioner. These two suits were consolidated by the District Court for the purposes of trial and at the conclusion of all the evidence the trial court instructed the jury to find for the defendant.

Petitioner's declaration in the first suit is found at (Record 2-5 inc.) and a copy of the policies of insurance sued on is found (Record 5-38 inc.) the two policies of insurance being the same except as to the amounts payable thereunder.

The suits were for a breach of contract and alleged that while the policies were in force the petitioner became totally and permanently disabled and thereby became entitled to monthly disability benefits and a waiver of the premiums. That the company waived the premiums and paid the disability benefits up until January 13th, 1933, but thereafter it wilfully and wrongfully declined to make any further payments and notified him on March 1st it would not make any further payments under either of said policies.

That on March 9th petitioner employed his attorney to represent him and his attorney made demand on the defendant for the breach of the contract and that on March 17th defendant company re-affirmed its former decision and notified the plaintiff's attorney that it declined to make any further disability payments.

Petitioner further averred that at the time he was totally and permanently disabled and would be the remainder of his life, and further averred that the defendant refused to make payment of the premium or waive the premium that had become due on February 2nd, 1933. The policy provided for furnishing due proof of disability (Record 5) and the payment of semi-annual premiums (Record 6), and provided that double indemnity and disability benefits shall not apply to temporary insurance or paid up insurance provided under surrender values of the policy, (Record 7 & 10) and upon proof being submitted provided for the waiver of premiums and payment of disability (Record 8); "*Before making any income payment or waiv-*

ing any premium, the Company may demand due proof of the continuance of total disability but such proof will not be required oftener than once a year after such disability has continued for two full years.'' (Italics ours.)

"Upon failure to furnish such proof, or if the Insured performs any work • • • no further income payments shall be made nor premiums waived." (Record 9.)

And further provided that if it once defaulted that it could be reinstated on furnishing proof of good health (Record 13); and provided in the event of default of payment of premium after three years then certain benefits would apply (Record 22).

On the trial of the cause it was admitted that petitioner had been continuously, totally and permanently disabled within the meaning of the policy up until the date of the trial since his operation for appendicitis (Record 174). He was operated on for appendicitis December 30th, 1930 (Record 109).

The defense was that the company had not denied liability but had simply suspended payments under the policy and after the matter had been taken up by the attorneys for the petitioner with the company it later determined that it was in the wrong and made a tender of past due installments to the petitioner, which having been refused by the petitioner it tendered into court.

Petitioner's replication to this special plea was to the effect that the company had totally breached its contract and re-affirmed its breach by its letter dated March 17th, which letter is shown (Record 162), and by letter of April 13th, 1933, (Record 163), and that petitioner being entitled to performance of the contract the petitioner thereby had the right of election to either treat it as breach and sue for breach of the contract measured by the present cash value of all benefits under the policy under his life expectancy or he had the right to accept the monthly payments and

he elected to pursue the remedy for a breach of the contract.

The trial court peremptorily instructed the jury to return a verdict for the defendant. (Record 192.) The case was carried to the Circuit Court of Appeals and affirmed on January 16th, 1935. (Record 216.)

B.

Reasons Relied On for the Allowance of the Writ.

The reasons upon which a writ of certiorari should be granted are as follows:

1. The decision of the Circuit Court of Appeals in this cause is in direct conflict with the decisions of the Supreme Court of the United States in the following cases:

Pearce v. *Tenn. Coal & Iron Co.*, 173 U. S. 1, 43 L. Ed. 591.

Roehm v. *Horst*, 178 U. S. 1, 44 L. Ed. 953.

Lovell v. *St. Louis Mutual Life Ins. Co.*, 111 U. S. 264, 28 L. Ed. 423.

2. The decision of the Circuit Court of Appeals in this cause is in direct conflict with the decisions of the Circuit Court of Appeals in the following cases:

Fed. Life Ins. Co. v. *Rasco*, 6th Circuit, 12 F. (2d) 693.

Mutual Reserve Fund Life Assur. Co. v. *Farrehbach*, 8th Circuit, 75 C. C. A. 304, 144 F. 342.

Prudential Ins. Co. of Am. v. *Faulkner*, 10th Circuit, 68 F. (2d) 676.

Colorado Yule Marble Co. v. *Collins*, 8th Circuit, 144 C. C. A. 376.

United Press Assn. v. *National Newspaper Assn.*, 8th Circuit, 150 C. C. A. 429.

Ætna Life Ins. Co. v. *Gehr*, 9th Circuit, 50 F. (2d) 657.

3. The decision of the Circuit Court of Appeals in this case is in direct conflict with the decisions of State courts in the following cases:

Ætna Life Ins. Co. v. *Phiefer*, 160 Ark. 98; 254 S. W., 335.

Indiana Life Endowment Co. v. *Reed*, 54 Ind. App. 450, 103 N. E. 77.

Knisely v. *Leathe*, 256 Mo. 341, 166 S. W. 257.

Milburn v. *Royal Union Mutual Life Ins. Co.* 209 Mo. App. 228, 234 S. W. 378.

Travelers Protective Assn. of Am. v. *Stevens*, 49 S. W. (2d) 365.

4. The decision of the Circuit Court of Appeals in this cause in affirming the judgment of the lower court failed to recognize the right of your petitioner to elect the remedy he desired to pursue for the breach of a contract by the defendant company at a time when petitioner was entitled to performance of the contract.

5. The defendant company by its letter of March 1st, 1933, (Record 159) and by its letter of March 17th, 1933 (Record 162), and its letter of April 13th, 1933 (Record 163), and its letter of June 5th, 1933 (Record 164), totally breached its contract and petitioner elected to treat it as a breach and filed suit for such breach.

The decision of the Circuit Court of Appeals in the instant case denies him that right.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding that court to certify and to send to this Court for its re-

view and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 7469, Roy T. Mobley v. New York Life Insurance Company, and that the judgment of the United States Circuit Court of Appeals for the Fifth Circuit may be reversed by this Honorable Court and your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

ROY T. MOBLEY,
By SIDNEY C. MIZE,
Counsel for Petitioner

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 751

ROY T. MOBLEY,

Petitioner,

vs.

NEW YORK LIFE INSURANCE COMPANY.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinion of the Court Below.

The opinion of the Circuit Court of Appeals for the Fifth Circuit is found at page 211 of the record, and was rendered on January 16th, 1935. The opinion of the District Court is found at page 191 of the Record where the court ruled on the application of the defendant company for a peremptory instruction.

II.

Jurisdiction.

1.

Jurisdiction is invoked under the Judicial Code, Sec. 240, as amended by Act of February 13th, 1925; 43 Statutes at Large 938, Sec. 347 U. S. Ann. Code Vol. 28.

2.

Jurisdiction is sustained by *Forsythe* v. *Hammond*, 166 U. S. 506, 41 L. Ed. 1095; *Hamilton Brown Shoe Co.* v. *Wolf Bros. Co.*, 240 U. S. 251, 60 L. Ed. 629; *Bradford Electric Light Co.* v. *Clapper*, 284 U. S. 221, 76 L. Ed. 254; *Roehm* v. *Horst*, 178 U. S. 1, 44 L. Ed. 953; *Pearce* v. *Tenn. Coal & Iron R. R. Co.*; 173 U. S. 1, 43 L. Ed. 591, in this, that

(a) Decisions of this Court holding that an unqualified and positive refusal to perform a contract at a time when the promisee was entitled to performance and in giving to the promisee the right of election to treat such refusal as a breach of the contract were entirely ignored.

(b) Decisions of the Circuit Court of Appeals of the other Circuits announcing the principle of law set out above were entirely ignored and are in conflict with the decision of the court in the instant case.

3.

Petitioner advances these specific claims:

First: defendant company positively and unequivocally breached its contract on the 1st of March, 1933 (Record 159) advising that it would make no more payments under the policies and re-affirmed unequivocally that announcement

in its letter of March 17th, 1933 (Record 162) to petitioner's attorney, and by its letter to petitioner dated June 5th, 1933, (Record 164).

Second: having unequivocally breached its contract petitioner had the right to elect to sue on such breach and claim full damages for a breach of the contract or to sue monthly as each installment fell due, and having elected to treat it as a breach and claim full damages no conduct of the defendant company thereafter by admitting its wrong could deprive him of his right to sue for full breach.

Third: The trial court and the Circuit Court of Appeals in their decisions denying him full damages for complete breach denied him a right given to him under the law.

III.

Statement of the Case.

Reference is respectfully made to "A Summary Statement of Matter Involved," *supra*, in the petition for Certiorari.

IV.

Specifications of Error.

Specification No. 1.

1. The court erred in finding and holding that the United States District Court for the Southern District of Mississippi correctly directed a verdict for the defendant, because

(a) The letters dated March 1st, 1933, March 17th, 1933, June 5th, 1933 showed a positive and unequivocal breach of the contract at a time when the petitioner was totally and permanently disabled and entitled to monthly disability benefits as shown by its letters in its file at the time

that he was totally and permanently disabled and on the trial admitted that he was totally and permanently disabled on the above dates.

(b) No conduct of the defendant company after it had breached its contract could deprive petitioner of his right to claim full damages for the breach.

SPECIFICATION No. 2.

2. The court erred in finding and holding that in the instant case there was not a clear and unequivocal repudiation by the promisor of its agreement.

V.

Summary of Argument.

POINT "A".

First. The decision below is contrary to and in conflict with prior decisions of this Court;

Pearce v. *Tenn. Coal & Iron R. R. Co.*, 173 U. S. 1, 43 L. Ed. 591;

Roehm v. *Horst*, 178 U. S. 1, 44 L. Ed. 953.

Lovell v. *St. Louis Mutual Life Ins. Co.*, 111 U. S. 264, 28 L. Ed. 423.

Second. The opinion of the Circuit Court of Appeals in the instant case is in direct conflict with decisions of the Circuit Court of Appeals of the Sixth Circuit, to-wit:

Federal Life Ins. Co. v. *Rasco*, 12 F. (2d) 693.

Of the Eighth Circuit:

Mutual Reserve Fund Life Assur. Co. v. *Farrenbach*, 75 C. C. A. 304; 144 Fed. 342.

Colorado Yule Marble Co. v. *Collins*, 144 C. C. A. 376, 230 Fed. 78.

United Press Assn. v. *National Newspaper Assn.*, 150 C. C. A. 429.

Of the Ninth Circuit:

Ætna Life Ins. Co. v. *Gehr*, 50 F. (2d) 657.

Of the Tenth Circuit:

Prudential Ins. Co. of Am. v. *Faulkner*, 68 F. (2d) 676.

Third. The opinion of the Circuit Court of Appeals is in conflict with the State decisions and the general law touching breach of contract involving mutual obligations on the part of the promisor and promisee:

Ætna Life Ins. Co. v. *Phiefer*, 160 Ark. 98; 254 S. W. 335.

Avery v. *Boden*, 5 E. L. & B. L. 714.

Barrick v. *Buba*, 2 C. B. N. S. 563.

Benjamin v. *Hilliard*, 23 Howard 149.

Carnig v. *Carr*, 167 Mass. 544, 35 L. R. A. 512.

Corpus Juris, Vol. 13, Section 725, page 651.

Daniels v. *Newton*, 114 Mass. 530.

Danube & B. S. R. R. Co. & K. Harbour Co. v. *Xenos*, 11 C. B. N. S. 152.

Danube & B. S. R. R. Co. & K. Harbour Co. v. *Xenos*, 13 C. B. N. S. 825.

East Tenn. V. & G. R. R. Co. v. *Staub*, 7 Lee 397, (Tenn.).

Grau v. *McVicker*, 8 Bliss 13, Fed. Case 5708.

Hancock v. *New York Life Ins. Co.*, Federal Case 6011.

Hinckley v. *Pittsburgh Bessemer Steel Co.*, 121 U. S. 264, 30 L. Ed. 967.

Hochster v. *De La Tour*, 2 E. L. & B. L. 678.

Indiana Life Endowment Co. v. *Reed*, 54 Ind. App. 450, 103 N. E. 77.

Knisley v. *Leathe*, 256 Mo. 341, 166 S. W. 257.

Miburn v. *Royal Union Mutual Life Ins. Co.*, 209 Mo. App. 228; 234 S. W. 378.

Nichols v. *Scranton Steel Co.*, 137 N. Y. 487, 33 N. E. 566.

Pakas v. *Hollingshead et al.*, 184 N. Y. 211, 77 N. E. 40.

Parker v. *Russell*, 133 Mass. 74.

Reid v. *Hoskins*, 6 E. L. & B. L. 593.

Schell v. *Plumb*, 55 N. Y. 592.

Travelers Protective Assn. of Am. v. *Stevens*, 49 S. W. (2d) 365.

Vicksburg & M. R. R. Co. v. *Putnam*, 118 U. S. 545, 30 L. Ed. 257.

POINT "B."

The facts shown by the record disclose a case where the defendant company on other occasions had breached its contract prior to the date of March 1st, 1933, but petitioner on those occasions had waived such breach and finally prevailed on the defendant company to re-instate the payments but was unable to do so after March 1st, 1933, until he had employed his attorney and had elected to treat the unequivocal refusal of the company to pay as a breach of the contract and was therefore entitled to maintain his suit, (authorities *supra*).

VI.

ARGUMENT.

(Point "A"). First. The decision of the court below is contrary to and in conflict with prior decisions of this

court. We respectfully call the courts attention to the case of *Roehm* v. *Horst*, 178 U. S. 1, where a full and complete discussion by this Court of the law governing the instant case is found.

Pearce v. *Tenn. Coal & Iron R. R. Co.*, 173 U. S. 1.
Lovell v. *St. Louis Mutual Life Ins. Co.*, 111 U. S. 264.

In the *Roehm* case the Court said:

> " • • • And also that if a contract provides for a series of acts, and actual default is made in the performance of one of them, accompanied by a refusal to perform the rest, the other party need not perform, but may treat the refusal as a breach of the entire contract, and recover accordingly." • • •
>
> "It seems strange that the defendant, after renouncing the contract and absolutely declaring that he will never act under it, should be permitted to object that faith is given to his assertion, and that an opportunity is not left to him of changing his mind." • • •
>
> "The man who wrongfully renounces a contract into which he has deliberately entered cannot justly complain if he is immediately sued for a compensation in damages by the man whom he has injured; and it seems reasonable to allow an option to the injured party, either to sue immediately, or to wait till the time when the act was to be done, still holding it as prospectively binding for the exercise of this option, which may be advantageous to the innocent party, and cannot be prejudicial to the wrongdoer." • • •
>
> "Its real operation appears to be to give the Promisee the right of electing either to treat the declaration as brutum fulmen, and holding fast to the contract, to wait till the time for its performance has arrived, or to act upon it and treat it as a final assertion by the promisor that he is no longer bound by

the contract, and a wrongful renunciation of the contractual relation into which he has entered. But such declaration only becomes a wrongful act if the promisee elects to treat it as such. If he does so elect, it becomes a breach of contract, and he can recover upon it as such." * * *

"In *Anvil Min. Co.* v. *Humble*, 153 U. S. 540, 38 L. Ed. 814, 14 Sup. Ct. Rep. 876, performance had been commenced, but completion was prevented by defendant, and Mr. Justice Brewer, speaking for the court, said: 'Whenever one party thereto is guilty of such a breach as is here attributed to the defendant, the other party is at liberty to treat the contract as broken and desist from any further effort on his part to perform; in other words, he may abandon it, and recover as damages the profits which he would have received through full performance. Such an abandonment is not technically a rescission of the contract, but is merely an acceptance of the situation which the wrongdoing of the other party has brought about.'"

In the *Pearce* case the Court said:

"But the recent tendency of judicial decisions in this country, in actions of contract, as well as in actions of tort, has been towards allowing entire damages to be recovered, once for all, in a single action, and thus avoid the embarrassment and annoyance of repeated litigation."

The facts making the foregoing principles of law applicable to the present record will be referred to and pointed out hereinafter.

(Point "A".) Second. The decision of the Circuit Court of Appeals in the instant case is in direct conflict with the following decisions of other circuits:

Sixth Circuit:

Federal Life Ins. Co. v. *Rasco*, 12 F. (2d) 693.

Eighth Circuit:

Mutual Reserve Fund Life Assur. Co. v. *Farrenbach*, 75 C. C. A. 304, 144 F. 342.

Colorado Yule Marble Co. v. *Collins*, 144 C. C. A. 376, 230 F. 78.

United Press Assn. v. *National Newspaper Assn.*, 150 C. C. A. 429.

Ninth Circuit:

Ætna Life Ins. Co. v. *Gehr*, 50 F. (2d) 657.

Tenth Circuit:

Prudential Ins. Co. of Am. v. *Faulkner*, 68 F. (2d) 676.

The *Rasco* case, *supra*, is absolutely on all fours with the instant case and was correctly decided by that Circuit. As held in that case and in the decisions of this Court, *supra*, the petitioner had the right of an election and when he elected to treat the unequivocal refusal to pay as a breach of the contract then the defendant company could not deprive him of that right by tendering him the amounts that were past due. After the promisor has unequivocally declined performance at a time when the promisee is entitled to performance it cannot thereafter change its mind over the objections of the promisee. This announcement is supported by the authorities hereinbefore cited and by the following authorities:

Ætna Life Ins. Co. v. *Gehr*, 50 F. (2d) 657.

Avery v. *Boden*, 5 E. L. & B. L. 714.

Barrick v. *Buba*, 2 C. B. N. S. 563.

Benjamin v. *Hilliard*, 23 Howard 149.

Carnig v. *Carr*, 167 Mass. 544, 35 L. R. A. 512.

Corpus Juris, Vol. 13, Section 725, page 651.

Daniels v. *Newton*, 114 Mass. 530.

Danube & B. S. R. R. Co. & K. Harbour Co. v. *Xenos*, 11 C. B. N. S. 825.

East Tenn. V. & G. R. R. Co. v. *Staub*, 7 Lee 397.

Grau v. *McVicker*, 8 Bliss 13, Fed. Case 5708.

Hancock v. *New York Life Ins. Co.*, Fed. Case 6011.

Hinckley v. *Pittsburgh Bessemer Steel Co.*, 121 U. S. 264, 30 L. Ed. 967.

Hochster v. *DeLa Tour*, 2 E. L. & B. L. 678.

Indiana Life Endowment Co. v. *Reed*, 54 Ind. App. 450, 103 N. E. 77.

Knisely v. *Leathe*, 256 Mo. 341, 166 S. W. 257.

Miburn v. *Royal Union Mutual Life Ins. Co.*, 209 Mo. App. 228, 234 S. W. 378.

Nichols v. *Scranton Steel Co.*, 137 N. Y. 487, 33 N. E. 566.

Pakas v. *Hollingshead et al.*, 184 N. Y. 211, 77 N. E. 40.

Parker v. *Russell*, 133 Mass. 74.

Reid v. *Hoskins*, 6 E. L. & B. L. 593.

Schell v. *Plumb*, 55 N. Y. 592.

Travelers Protective Assn. of Am. v. *Stevens*, 49 S. W. (2d) 365.

Vicksburg & M. R. R. Co. v. *Putnam*, 118 U. S. 545, 30 L. Ed. 257.

POINT "B"

The facts justifying the application of the principles of law hereinbefore set out are shown by the record as follows:

On March 1st, 1933, the defendant company wrote petitioner that it would no longer make any payments. (Record 159.) On March 6th, 1933 petitioner replied that he was taking steps to secure his benefits under the policies. (Record 101.) On March 9th, petitioner's attorney wrote the

company that he had been employed to represent petitioner and made demand on the company for payment in full under the policies for the remainder of petitioners natural expectancy. (Record 161.) On March 17th, 1933 the defendant company replied to said attorney it would adhere to its former decision. (Record 162-163.)

At the time defendant company declined to make payment of the disability benefits it had the knowledge in its files that petitioner had been continuously disabled since December, 1930, and that although it had theretofore declined to make payments it later reinstated the payments after petitioner had threatened suit against it and had found the reports of its own doctor were erroneous. (See letters record 71, 73, 74, 79, 80, 84, 86, 87, 88, 90, 92, 93, 95, 96). At the same time it also had in its possession letters from the appellant himself stating his condition. (Record 98, 99, 110, 116, 126, 148, 149, 152, 153, 154). It had the reports of the doctors on his condition which showed total disability, (Record 118, 119, 124, 131, 132, 138, 139, 155, 156, 157, 158).

We especially call the Court's attention to the reports of Dr. Beck and Dr. Dossett, (Record 144) dated May 4th, 1932, in which Dr. Beck tells them at that time that appellant was suffering with his heart. Also, letter of Dr. Dossett of May 12th, 1932, (Record 144, 145, 146).

The foregoing reports will show that petitioner was totally and permanently disabled and that the company without any reason or justification whatever declined to make any further payments and went so far as to lapse one of the policies and applied the value to paid up insurance, which policy, under that feature of it did not give disability benefits. (Record 10). The analysis of the record therefore is this:

(1) Petitioner was totally and permanently disabled since December, 1930, and was entitled to performance of the contract when the defendant breached it.

(2) The contract embraced mutual obligations. The company could demand the furnishing of proof of his continued disability and was therefore not an executed contract.

(3) It unequivocally refused payment at a time when plaintiff was entitled to performance and it did not notify him why it was refusing nor did it demand or request additional proof before it refused payment.

(4) Petitioner elected to treat the refusal as a breach and sue for damages, the measure of which was the present cash value of the benefits provided by the policy computed over his life expectancy.

VII.

Conclusion.

It is therefore respectfully submitted that the District Court erred in giving the preemptory instruction and the Circuit Court of Appeals was in error in affirming the judgment.

The facts show that plaintiff was totally and permanently disabled and the company refused to perform when under its contract it was required to do so. It admitted the validity of the contract but unequivocally refused to perform.

This is a case therefore that we respectfully submit calls for the exercise by this Court of its supervisory powers in order that the law may be settled finally wherein such confusion between the various Circuits and the various state Courts now exists, and in order that the errors complained of herein may be corrected, that a writ of certi-

orari should be granted and this Court should review the decision of the United States Circuit Court of Appeals for the Fifth Circuit and finally reverse it.

Respectfully,

SIDNEY C. MIZE,
R. W. THOMPSON, JR.,
WEBB M. MIZE.
Counsel for Petitioner.

(6045-C)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 751

ROY T. MOBLEY,

Appellant,

versus

NEW YORK LIFE INSURANCE COMPANY,

Appellee.

BRIEF FOR APPELLANT.

May It Please the Court:

There was no official report of the opinion of the District Court but his opinion that was delivered on the application for a directed verdict is found at page 138 of the Record.

The official opinion of the Circuit Court of Appeals for the Fifth Circuit is reported in Vol. 74, (2d) Fed. Rep. 588; Advance Sheets dated March 11th, 1935, and found in the record at page 151, *et seq.*

STATEMENT OF THE CASE.

The case comes from the Southern District of Mississippi in which the trial court peremptorily instructed the jury to return a verdict for the defendant. There were two suits based on two separate policies of insurance issued by the New York Life Insurance Company to the appellant which carried certain disability benefits. For the purposes of trial the two suits were consolidated.

Appellant's declaration in the first suit is found at (Record 1 to 3, inc.) and a copy of the policies of insurance sued on is found (Record 3 to 25, inc.), the two policies of insurance being the same except as to the amounts payable thereunder.

The suits were for a breach of contract and alleged that while the policies were in force the appellant became totally and permanently disabled and thereby became entitled to monthly disability benefits and a waiver of the premiums. That the company waived the premiums and paid the disability benefits up until January 13th, 1933, but thereafter it wilfully and wrongfully declined to make any further payments and notified him on March 1st it would not make any further payments under either of said policies.

That on March 9th, appellant employed attorneys to represent him and his attorneys made demand on the defendant for the breach of the contract and that on March 17th defendant company re-affirmed its former decision and notified the appellant's attorney that it declined to make any further disability payments.

Appellant further averred that at the time he was totally and permanently disabled and would be the remainder of his life, and further averred that the defendant refused to make payment of the premium or waive the premium that had become due on February 2nd, 1933. The policy provided for furnishing due proof of disability (Record 4), and the payment of semi-annual premiums (Record 4); it provided that double indemnity and disability benefits shall not apply to temporary insurance or paid up insurance provided under surrender values of the policy (Record 5 and 7), and upon proof being submitted provided for the waiver of premiums and payment of disability (Record 6): "*Before making any income payment or waiving any premium, the Company may demand due proof of the continuance of total disability but such proof will not be required oftener than once a year after such disability has continued for two full years.*" (Italics ours).

"Upon failure to furnish such proof, or if the Insured performs any work * * * no further income payments shall be made nor premiums waived." (Record 6 and 7).

And further provided that after any default it could be reinstated on furnishing proof of good health (Record 9); and provided in the event of default of payment of premium after three years then certain benefits would apply (Record 14).

On the trial of the cause it was admitted that appellant had been continuously, totally and permanently dis-

abled within the meaning of the policy up until the date of the trial since his operation for appendicitis (Record 125). He was operated on for appendicitis December 1930, (Record 77).

The defense was that the company had not denied liability but had simply suspended payments under the policy and after the matter had been taken up by the attorneys for the petitioner with the company it later determined that it was in the wrong, and made a tender of past due installments to the appellant, which having been refused by the appellant it tendered into court (Record 40-41).

Appellant's replication to this special plea was to the effect that the company had totally breached its contract and re-affirmed its breach by its letter dated March 17th, which letter is shown (Record 116), and by letter of April 13th, 1933 (Record 117), and by letter of June 5th, 1933 (Record 118), and that appellant being entitled to performance of the contract the appellant thereby had the right of election to either treat it as breach and sue for breach of the contract measured by the present cash value of all benefits under the policy under his life expectancy or he had the right to accept the monthly payments and he elected to pursue the remedy for a breach of the contract. Replication is found (Record 44, *et seq.)*.

The trial court peremptorily instructed the jury to return a verdict for the defendant (Record 138). The case was carried to the Circuit Court of Appeals and affirmed on January 16th, 1935 (Record 156).

SPECIFICATIONS OF ERROR URGED.

Specification No. 1 (R. 147):

The lower court erred in finding and holding that the jury should be peremptorily instructed to find a verdict for the appellee (Record 138), because:

A. The letters dated March 1st, 1933 (Record 113), March 17th, 1933 (Record 116), letter dated April 13th, 1933 (Record 117), and letter dated June 5th, 1933 (Record 118) showed a positive and unequivocal breach of the contract at a time when the appellant was totally and permanently disabled and entitled to monthly disability benefits as shown by its letters in its file at the time that he was totally and permanently disabled, and on the trial admitted that he was totally and permanently disabled on the above dates. (Record 125).

B. No conduct of the defendant company if it had breached its contract could deprive the appellant of his right to claim full damages for the breach.

Specification No. 2:

The court below erred in finding and holding that in the instant case there was not a clear and unequivocal repudiation by the promisor of its agreement with the appellant. (Record 138).

ARGUMENT.

Points of Fact:

The facts are, that on March 1st, 1933, the appellant was totally and permanently disabled within the meaning of the policy, and had been since December 13th, 1930, when he was operated on for appendicitis. (Record 125). Prior to March 1st, 1933, the company had been paying his disability benefits under the policy and had waived the premiums, but on several occasions had notified him that it was not going to make any further payments and that it would not waive further premiums, by letter dated July 6th, 1931 (Record 49), letter of July 11th, 1931 (Record 50), letter of September 25th, 1931 (Record 58). However, the payments during this year were finally reinstated on October 9th, 1931, and on October 12th, 1931. (Record 60 and 61). On March 19th, 1932, it again advised him that no further payments would be made (Record 65), and that the premium had to be paid, but on April 20th, 1932, it agreed to give further consideration to his claim (Record 65), and on May 16th, 1932, the payments not having been resumed, appellant wrote the company that unless payments were resumed by the end of that week he would file suit in George County. (Record 104).

On May 21st, 1932, payments were again resumed and the past due installments paid. (Record 105). On December 17th, 1932, not having received his payment appellant wrote the company that he must have some definite information from it about the payment then due (Record 106), to which the company replied on December 27th, 1932, that the payment was being approved (Record 67), and on

January 19th, 1933, it wrote him a letter asking information as to his condition (Record 68), to which he replied that he was totally disabled. (Record 68-69-70). Not having received a reply to his letter appellant wrote the company on February 22nd, 1933, asking for the payment then past due. (Record 70). On February 28th, 1933, he advised the company by letter that unless they paid him immediately he would assume that they were denying liability (R. 70); March 1st, 1933, it replied, denying further liability. (Record 113). On March 6th, 1933, appellant wrote the company he was taking legal steps to secure his benefits (Record 71), and on March 9th, 1933, appellant's attorneys wrote the company advising it of their employment and making demand for a breach of the contract (Record 114-115), to which the appellees replied on March 16th, 1933 (Record 115), and further reply of March 17th, 1933, adhering to its former decision not to waive any further premiums or pay any more benefits. (Record 116-117).

The reports of doctors who had examined the appellant showed that he was totally disabled. See reports of Dr. Shands (Record 80), Dr. Currie (Record 81-90), Dr. Huggins, who was the company's own examiner for Mississippi (Record 83-87-93-98-111-112-113), report of Dr. J. E. Beck dated May 4th, 1932, in which Dr. Beck tells the company that at that time appellant was suffering with his heart (Record 102), report of Dr. Dossett dated May 12th, 1932 (Record 103-104).

The reports of appellant himself to the company showed unmistakably that he was totally disabled. (Record 50-51-68-69-70-77-82-106-109-110).

The appellee having agreed that he was disabled up until the date of the trial (Record 125), appellant then introduced medical testimony showing that he was totally and permanently disabled forever and would not ever be able to resume any kind of work for remuneration. See testimony of Dr. Beck (Record 74-75); also testimony of Dr. F. S. Gay (Record 126); testimony of Dr. E. A. Copeland (Record 127).

Appellant further showed that if appellant should be relieved of worries from a financial standpoint and could receive complete rest it would prolong for a greater length of time his life (Record 75), and that if he should have proper treatment, proper rest and relief from worry and financial troubles that he could expect to live practically the normal length of his life. (Record 126-127).

Appellant was 32 years old in June, 1934 (Record 125), being 31 years old in March, 1933, when the policy was breached. Appellant showed the life expectancy of a man 31 years old to be 34.63 years. (Record 128). He showed the value of the two policies as of March 13th, 1933, to be $21,309.84 (Record 130), and the interest computed on that amount to the date of trial makes $22,559.99. (Record 130).

The points of facts summarized are:

1. Appellant had two policies carrying disability benefits.
2. He became totally and permanently disabled while they were in force.

3. The policies carried mutual obligations.
   (A) The duty of the company to pay.
   (B) The duty of appellant to furnish due proof of his disability when demanded by the company, which right the company had.
4. The company absolutely repudiated its obligations under the policies.
5. Appellant showed that his disability will be forever.
6. Appellant showed his life expectancy and the present value of the policies.

Points of Law.

Specification No. 1:

It was error for the lower court to direct the jury to return a verdict for the defendant. Upon an application for a directed verdict all of the evidence for the plaintiff, together with all reasonable inferences therefrom is to be taken as true.

Maryland Casualty Co. v. Millie R. Jones, 279 U. S. 792, 73 L. Ed. 960.
Gunning v. Cooley, 281 U. S. 90, 74 L. Ed. 720.
Chesapeake & Ohio R. R. v. Martin, 283 U. S. 209, 75 L. Ed. 983.
U. S. F. & G. Co. v. Wilson, 41 Fed. (2d) 319.
Central Trust Co. of Ill. v. Chicago Auditorium Association, 240 U. S. 581, 60 L. Ed. 811.

A.

Taking all of the evidence with reasonable inference therefrom as true the company had unequivocally breached its contract and the appellant then had the right of election

as to whether he would sue for an entire breach of the contract and recover all damages in one suit or he could have sued monthly as each installment fell due, and having elected to sue for a breach of the contract the company could not deprive him of that right by reconsidering its position and tendering benefits.

Pearce v. Tenn. Coal & Iron R. R. Co., 173 U. S. 1; 43 L. Ed. 591.

Roehm v. Horst, 178 U. S. 1; 44 L. Ed. 953.

Anvil Mining Co. v. Humble, 153 U. S. 540; 38 L. Ed. 814.

Lovell v. St. Louis Mutual Life Ins. Co., 111 U. S. 264; 28 L. Ed. 423.

Vicksburg & M. R. R. Co. v. Putnam, 118 U. S. 545; 30 L. Ed. 257.

Fed. Life Ins. Co. v. Rasco, 12 Fed. (2d) 693.

Mutual Reserve Fund Life Assurance Co. v. Farrenbach, 75 C. C. A. 304; 144 Fed. 342.

Colorado Yule Marble Co. v. Collins, 144 C. C. A. 376; 203 Fed. 78.

United Press Assn. v. National Newspaper Assn., 150 C. C. A. 429.

Aetna Life Ins. Co. v. Gehr, 50 Fed. (2d) 657.

Prudential Ins. Co. of Am. v. Faulkner, 68 Fed. (2d) 676.

Aetna Life Ins. Co. v. Phiefer, 160 Ark. 98; 254 S. W. 335.

Avery v. Boden, 5 E. L. & B. L. 714.

Barrick v. Buba, 2 C. B. N. S. 563.

Benjamin v. Hilliard, 23 Howard, 149.

Corpus Juris, Vol. 13, Section 725, page 651.

Daniels v. Newton, 114 Mass. 530.

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Danube & B. S. R. R. Co. & K. Harbour Co. v. Xenos, 13 C. B. N. S. 825.

East Tenn. V. & G. R. R. Co. v. Staub, 7 Lee, 397, (Tenn.).
Grau v. McVicker, 8 Biss 13, Fed. Case 5708.
Hancock v. New York Life Ins. Co., Fed. Case 6011.
Hinckley v. Pittsburgh Bessemer Steel Co., 121 U. S. 264, 30 L. Ed. 967.
Hochster v. De La Tour, 2 E. L. & B. L. 678.
Indiana Life Endowment Co. v. Reed, 54 Ind. App. 450, 103 N. E. 77.
Miburn v. Royal Union Mutual Life Ins. Co., 209 Mo. App. 228; 234 S. W. 378.
Nichols v. Scranton Steel Co., 137 N. Y. 487; 33 N. E. 566.
Pakas v. Hollingshead, et al., 184 N. Y. 211; 77 N. E. 40.
Parker v. Russell, 133 Mass. 74.
Reid v. Hoskins, 6 E. L. & B. L. 593.
Schell v. Plumb, 55 N. Y. 592.
Travelers Protective Assn. of Am. v. Stevens, 49 S. W. (2d) 365.
Hamilton v. Love, 152 Ind. 641; 53 N. E. 181.
9 Cyc. 635.
Liberty Life Ins. Co. v. Olive, 180 Ark. 339; 21 SW (2d) 405.
National Life & Accident Ins. Co. v. Whitfield, 53 S. W. 10.
Atlas Life Ins. Co. of Tulsa v. Bolling, 53 S. W. 1.
Richards on Law of Ins., 4th Ed. 580, Sec. 342.
Phillips v. U. S. Benefit Soc., 79 N. W. 1.
R. C. L. Vol. 6, 1023, Sec. 384-385-389.
Reed Bros. v. Bluff City Motor Co., 139 Miss. 441; 104 So. 161.
Leek Milling Co. v. Langford, 81 Miss. 728; 33 So. 492.
Bolling v. Red Snapper Sauce Co., 97 Miss. 785.
Bu-Vi-Bar Petroleum Corp. v. Krow, et al., 40 Fed. (2) 488.
Carter v. Witherspoon, 126 So. 388.

The contract was one carrying mutual obligations. The company could demand due proof of continuance of total disability and could enforce this obligation of the contract by refusing further payment or waiving any further premiums. See the policy (Record 6-7), being a contract of mutual obligations.

When it unequivocally breached its contract, then under the authorities above cited appellant had the right to sue for a total breach. On March 1st, 1933, the company did not suspend payments but it breached its contract when it was in full force, all the facts showing the appellant was entitled to performance. It did not say it was suspending payments but informed him that no further payments would be made and that premiums on both policies due on and after February 7th, 1933, became payable in conformity with the terms of the contract. (Record 113-114). Then re-affirmed this in unmistakable language at the conclusion of its letter of March 17th. (Rec. 116-117). Then, to make it still stronger, it notified him on the 13th of April, 1933, that one policy had already lapsed for the non-payment of premiums and urged him to reinstate the policy which would have required a showing of good health. (Record 117). Then on June 5th, appellant not having applied for reinstatement it applied the value of the policy as temporary insurance. (Record 118). This temporary insurance, however, was entirely a different contract as the disability benefit and double indemnity benefit provision of the policy did not apply to this temporary insurance. (Record 5-7), so that there was a positive unequivocal breach of the contract. The breach of contract having been completely shown appellant was entitled to recover such dam-

ages as he had suffered by the breach, and is only required to prove these with reasonable certainty.

Pearce v. Tenn. Coal & Iron R. R. Co., 173 U. S. 1; 43 L. Ed. 591.

B.

No conduct of the defendant company after it had breached its contract could deprive appellant of his right to claim full damages for the breach. Appellee completely repudiated its contract on March 1, 1933, and re-affirmed it on March 17th, 1933, and again on June 5, 1933, and the appellant having elected to treat it as a breach and employed his attorneys had thereby changed his position and elected, as he had a right to do, to demand full damages for the complete breach, and having changed his position, the company cannot then be heard to say that it would like to change its position and tender benefits. This right belonged to the appellant.

Pearce v. Tenn. Coal & Iron R. R. Co., 173 U. S. 1; 43 L. Ed. 591.
Roehm v. Horst, 178 U. S. 1; 44 L. Ed. 953.
Holloway v. Griffith, 32 Iowa, 409.
Bu-Vi-Bar Petroleum Corp. v. Krow, et al., 40 Fed. (2) 488.

Specification No. 2:

The lower court erred in finding and holding, R. 138, that in the instant case there was not a clear and unequivocal repudiation by the promissor of its agreement, and held that the defendant company had not unequivocally repudiated the contract and that appellant had done all he was required to do and the contract was therefore executed

on his part. The Circuit Court of Appeals likewise held that there was not a repudiation but only a suspension of payments. (R. 155). If that holding were correct, then appellant would not be entitled to recover for a breach, but if there was an unequivocal breach then appellant would be entitled to recover.

An examination of the record will demonstrate clearly that the lower courts were in error in so finding.

Prior to March 1st, 1933, appellee on three occasions had notified appellant it would make no further payments but after threatened suit by the appellant it re-considered and admitted its error and resumed payments. In December, 1932, it had suspended payment and after several letters heretofore referred to, passed between appellant and appellee it called on him in January, 1933, for further proof of his continued disability. At that time it had in its files positive and undisputed proof that appellant was totally disabled, and on December 17th, 1932, appellant wrote the company, (Record 106), his condition, and on January 19th, 1933, the company sent appellant its questionnaire (Record 68 to 70) and in response thereto appellant answered it fully showing his total disability, and on January 24th, 1933, its own examiner from Mississippi, Dr. Huggins, reported (Record 111-112) that appellant had heart trouble and had been prevented by reason of his disability from working since December 13th, 1930, and that he had low blood pressure, complains of indigestion, no energy, weakness, and that Dr. Beck had advised him not to do any work of any nature. Diagnosis, heart trouble; and the company then wrote Dr. Huggins for further in-

formation and he replied (Record 112-113) that he did not think appellant could follow any occupation requiring mental or physical strain, and on December 22nd, 1932, it had the report of its private investigator, (Record 107-108), in which it was stated that the investigator had not seen him for several months and that he was apparently sick. That Dr. Copeland of Jackson was his attending physician and that appellant had told informant on the phone that day that he had never recovered from his operation for appendicitis. With all of this information in its file and with full knowledge that it had been in the wrong three times prior to March 1st, 1933, and without any information that he was able to go to work, it arbitrarily and in language as plain as can be used, told him in its letter of March 1st it was not going to make any further payments and he would have to pay all premiums due on and after February 7th, 1933. It did not call on appellant for any further reports of his condition. It did not call on Dr. Copeland for another report and it was agreed (Record 125) that none of the confidential reports' contents or the doctors' reports made to the company concerning appellant were ever made known to him before he filed his suit. Then, when the matter was taken up with the company by his attorneys it replied on March 17th after going through its files it adhered to its former decision and followed this up with the positive declaration to appellant that he had not paid his premium and the policy had therefore lapsed and it had applied the value of the policy to temporary insurance, which as a matter of fact entirely repudiated the contract because the temporary insurance did not carry disability benefits nor double indemnity benefits.

We are unable to conceive a more unequivocal breach of its contract than was committed by the company in this case. We do not see where language any stronger or conduct any more forceful could have been used than it did use. Therefore, when the company committed the breach the appellant then had the right of election.

In the *Roehm* case, cited *supra*, the court said:

> " • • • And also that if a contract provides for a series of acts, and actual default is made in the performance of one of them, accompanied by a refusal to perform the rest, the other party need not perform, but may treat the refusal as a breach of the entire contract, and recover accordingly." • • •
>
> "It seems strange that the defendant, after renouncing the contract and absolutely declaring that he will never act under it, should be permitted to object that faith is given to his assertion, and that an opportunity is not left to him of changing his mind."
>
> "The man who wrongfully renounces a contract into which he has deliberately entered cannot justly complain if he is immediately sued for a compensation in damages by the man whom he has injured; and it seems reasonable to allow an option to the injured party, either to sue immediately, or to wait till the time when the act was to be done, still holding it as prospectively binding for the exercise of this option, which may be advantageous to the innocent party, and cannot be prejudicial to the wrongdoer." • • •
>
> "Its real operation appears to be to give the Promisee the right of electing either to treat the declaration as brutum fulmen, and holding fast to the contract, to wait till the time for its perform-

ance has arrived, or to act upon it and treat it as a final assertion by the promisor that he is no longer bound by the contract, and a wrongful renunciation of the contractual relation into which he has entered. But such declaration only becomes a wrongful act if the promisee elects to treat it as such. If he does so elect, it becomes a breach of contract, and he can recover upon it as such." • • •

"In *Anvil Mining Co. v. Humble, 153 U. S. 540, 38 L. Ed. 814, 14 Sup. Ct. Rep. 876*, performance had been commenced, but completion was prevented by defendant, and Mr. Justice Brewer, speaking for the Court, said: 'Whenever one party thereto is guilty of such a breach as is here attributed to the defendant, the other party is at liberty to treat the contract as broken and desist from any further effort on his part to perform; in other words, he may abandon it, and recover as damages the profits which he would have received through full performance. Such an abandonment is not technically a rescission of the contract, but is merely an acceptance of the situation which the wrongdoing of the other party has brought about.'"

The case of *Federal Life Ins. Co. v. Rasco, 12 Fed. (2d) 693, 71 L. Ed. 859*, in which certiorari was denied, by this court, was correctly decided by the *C. C. A.*, and is on all fours with the instant case. In that case the court said:

"This is a single contract. The fact that defendant is required to perform in part at stated intervals does not change its unitary character into a multiplicity of contracts, each relating to but one installment. If there has been an actual breach, coupled with repudiation, of this one contract, then, to avoid a multiplicity of suits, public policy requires that plaintiff may maintain but one action for the entire damages occasioned by such breach."

In the instant case there was an actual breach when it refused to pay at a time when it was under duty to pay. There was a complete repudiation when it lapsed the policy and applied its value to a different kind of contract and also announced that all premiums on the other policy after February 7th, 1933, would have to be paid. This was done, at a time when it had no right to do so as it now admits. The contract of insurance in the instant case is a single contract so stated by its own terms. (Record 18):

In the case of *Pearce v. Tenn. Coal & Iron R. R. Co., supra*, the court uses this language:

> "The defendant committed an absolute breach of the contract **at a time when the plaintiff was entitled to require performance.** The plaintiff was not bound to wait to see if the defendant would change its decision and take him back into its service; or to resort to successive actions for damages from time to time; * * * **he had the right to elect to treat the contract as absolutely and finally broken by the defendant** (emphasizing ours); to maintain this action, once for all, as for a total breach of the entire contract."

Appellee will urge among other things that the case of *Metropolitan Life Ins. Co. v. Lambert, 128 So. 750, 157 Miss. 759*, and the case of *Atlantic Life Ins. Co. v. Serio, 157 So. 470*, a Mississippi case, are controlling on this court as expressing the policy of Mississippi.

While the court in the *Serio* case announced it would not follow the *Rasco* case it was not necessary for the court to make that statement to a decision of the *Serio* case. In

the *Serio* case the insurance company was undertaking to take advantage of its own wrong, contending it had notified Serio it repudiated the policy and would not be bound under it any longer in 1927. The Mississippi court overlooked the fact that the right of election was given to the insured to see whether he would sue for a total breach or whether he would sue monthly, and the right is not given to the promissor and therefore the insurance company could not invoke the principle announced in the *Roehm* case and the *Rasco* case hereinbefore cited.

The *Lambert* case has no application for the reason that the suit was not based on a total repudiation of the contract of insurance but as stated by the court in that case the declaration alleged the failure of the appellant to pay any of the monthly installments accrued under the policy. While the prayer of the declaration in the case was for total sum of $2000.00 an examination of the opinion shows that it did not sue for the present cash value of all of the benefits he was entitled to under the contract and if the court meant to hold that a party could not recover for a total breach of the contract it was *dictum* for the reason that the pleadings did not justify this announcement. However, if the matter was properly before the Supreme Court of Mississippi and that is its holding, yet, such holdings are in conflict with the decisions of this court and is not binding on this court.

The case of *Mutual Life Ins. Co. of New York v. Johnson*, decided by this court on December 3rd, 1934, and reported in Advance Sheets of Law Ed. Advance Opinions, *Vol. 79, page 127*, is not applicable for the reason that the question here is a general principle of the law of contracts

of insurance and the decisions of this court will control over the decisions of a court of the State and is governed by the principles of law announced by this court in *Aetna Life Ins. Co. v. Moore, 231 U. S. 543, 58 L. Ed. 356; Carpenter v. Providence Washington Ins. Co., 16 Pete, 495, 10 L. Ed. 1044; Kuhn v. Fairmont Coal Co., 215 U. S. 349, 54 L. Ed. 228; Bu-Vi-Bar Petroleum Corp. v. Krow, et al., 40 Fed. (2) 488.*

CONCLUSION.

Appellee contended in the courts below, and will probably contend here that to enforce the doctrine of anticipatory breach to claims of this character would lead to consequences difficult to foresee, and the Circuit Court of Appeals in its opinion stated that if appellant were allowed a present recovery for all further benefits the calculation on which insurance business is done would be upset, and the purposes for which the benefits were made payable only in installments would often be defeated. The reply to this reasoning is that if the insurance companies writing these disability benefit policies would carry out their contracts there would be no occasion for a suit on an anticipatory breach, and in the instant case refused to waive all premiums due after February 7th, 1933.

If the company in this case had kept an open mind and advised appellant that it wanted additional proof and given him the benefit of the information it had, then appellant would have had no cause of action but in this case the company did not do that. It kept from him the report of its confidential adviser and the report of its own physician,

and without any cause or reason whatever advised him that all premiums would become due and payable by him after February 7th, 1933, and that no further disability benefits would be paid, and this was done at a time when the appellant did not know why, and at a time when he was entitled to performance, and instead of keeping an open mind and seeking further information it carried out its threats and did lapse his policy just as it said it would do. Appellant, having changed his position by employing his attorney, and taking action was not then required under the law to accept the tender made by the appellee.

We therefore respectfully submit that the cause should be reversed and remanded.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

NO. 751.

ROY T. MOBLEY, Petitioner,

vs.

NEW YORK LIFE INSURANCE COMPANY.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

In opposition to the petition for writ of certiorari filed by the petitioner herein, the respondent shows unto the Court:

A.

STATEMENT OF FACTS.

For the purposes of this brief, the respondent adopts the statement of facts contained in the opinion delivered by the Circuit Court of Appeals for the Fifth Circuit, **Mobley vs. New York Life Ins. Company, 74 F. (2) 588,** wherein the following language is used:

> "This appeal complains mainly of the instruction by the Court of a verdict for the defendant in the trial of consolidated suits brought by Roy T. Mobley against the New York Life Insurance Company upon two similar policies of life insurance carrying benefits in case of total disability.

By the terms of the policies, premiums necessary to maintain the insurance were due semi-annually, but on proof of total disability before the age of sixty, subsequent premiums were to be waived and monthly benefits paid so long as the disability lasted. Proof of continuance of the disability might be demanded not oftener than once a year, and on failure to furnish such proof, no future disability payments would be made nor further premiums waived; but in case of default in payment of premiums after total disability, the policy might be restored and all benefits paid as if no default had occurred, provided that not more than six months after the default due proof were made of a continuous total disability since the default that would continue for life, or that had continued for three consecutive months. Mobley, at the age of thirty-three, while his policies were in force, had an operation for appendicitis with results that totally disabled him, and he collected disability benefits for two years through January, 1933. The Insurance Company, on March 1, 1933, wrote to him: 'It appears that for some time past you have not been continuously totally disabled within the meaning of the disability benefit provision contained in the policies. In view of this condition, we regret to inform you that no further disability payments will be made, and the premiums due on and after February 7, 1933, become payable in conformity with the terms of the contracts.' Mobley in reply said he was taking im-

mediate legal steps to secure the benefits under the policies. On March 9th, the Company wrote that the matter was receiving further attention, and the same day an attorney employed by Mobley wrote the Company demanding payment of $28,980.00 as for a total breach of the insurance contracts and threatening suit. On March 17th, the Company wrote the attorney that its medical examiner in January had reported Mobley able to do light work of a remunerative nature, and that he could no longer be considered totally disabled within the definition of the policies, and that payment of benefits had been discontinued, to which decision it would adhere. On April 13th, the Company wrote Mobley that one of the policies had lapsed for nonpayment of premium, and urged him to apply for reinstatement to protect his interests. On June 5th, it advised him: 'Application for reinstatement after default in premium, specified above not having been made, notice is hereby given that pursuant to the terms of the policy, the value of the policy has been applied to purchase continued insurance' until June 20, 1937. On June 9th, the Company gave notice of the premium falling due July 9th on the other policy. On July 8th, Mobley's attorney had written that Mobley did not agree to the action stated in the letter of June 5th, and would sue in a few days. In answer, the Company wrote that it was willing to give Mobley's claim for disability benefits further consideration, and asked for a statement from his phy-

sician as to his condition since January, and stated that one of its physicians would also call on Mobley to examine him. The examination was made July 24th, and chronic heart disease was found. The Company claimed that this was its first knowledge of the heart trouble. It concluded he was totally disabled and tendered him on August 9th $910.00 accrued benefits, and a written waiver of premiums; but, on July 24th, suit on one policy had been filed, and a few weeks later suit was filed on the other. The Company pleaded the foregoing facts and correspondence, and continued the tender with accrued costs. The suits claim a recovery of damages measured by the sum of the disability payments for the life expectancy of Mobley plus the amount that would be due at his death, all reduced to preesnt value, upon the theory of an anticipatory breach of the contracts. The Judge directed that the plea of tender be sustained."

B.

ARGUMENT.

POINT I.

The decision of the Supreme Court of Mississippi should be highly persuasive.

We are well aware of the rule that in questions of important commercial law Federal courts are not necessarily bound by state court decisions upon common law questions. This rule does not justify the conclusion, however, that state decisions should be thoroughly disregarded. Upon

the other hand, the policies were delivered and the premiums paid in Mississippi. The policies were Mississippi contracts. **New York Life Insurance Co. v. Dodge**, 38 S. Ct. 337, 246 U. S. 357, 62 L. Ed. 772.

And, therefore, necessarily great regard should be had for the state law upon the subject even if common law principles are applicable. It is only where the state rule as announced is contrary to well-established principles of common law prevailing in the Federal courts that such courts would be justified in disregarding the state rule.

In the case of **Trainor v. Aetna Casualty & Surety Co.**, 290 U. S. 47, 78 L. Ed. 162, this Court used the following language, which is highly applicable to the present case:

> "The circuit court of appeals held that the Pennsylvania decisions merely declared the common law of that state with regard to suretyship, and since the law is derived from the principles of general jurisprudence common to all the states, a federal court, in determining what it is, might exercise an independent judgment. We do not deem it necessary to discuss the principle enunciated or to decide whether the Pennsylvania decisions come within it. It is enough to say that even where the principle applies, 'for the sake of harmony and to avoid confusion, the federal courts will lean towards an agreement of views with the state courts if the question seems to them balanced with doubt.' Burgess v. Seligman, 107 U. S. 20, 33, 34, 27 L. Ed. 359, 365, 2 Sup. Ct. 10. And see Sim vs. Edenborn, 242 U. S. 131, 135, 61 L. Ed 199, 203,

37 S. Ct. 36, where the authorities are collected; Community Building Co. vs. Maryland Casualty Co., (C. C. A. 9), 8 Fed. (2) 678, 680. In the present case, it would not be going far enough to say merely that the question is 'balanced with doubt,' for it seems to us that the Pennsylvania decisions and those of the other states cited above, are plainly right. Compare Messenger vs. Anderson, 225 U. S. 436, 444, 56 L. Ed. 1152, 1156, 32 S. Ct. 739."

In the recent case of **Mutual Life Ins. Co. of New York v. Johnson,** Adv. Opinions, October term, 1934, decided by this Court December 3, 1934, Judge Cardozo used the following language:

"In this situation, we are not under a duty to make a choice for ourselves between alternative construction as if the courts of the place of the contract were silent or uncertain. Without suggesting an independent preference, either one way or the other, we yield to the judges of Virginia expounding a Virginia policy and adjudging its effects. The case will not be complicated by a consideration of our power to pursue some other course. The summum jus of power, whatever it may be, will be subordinated at times to a benign and prudent comity. At least, in cases of uncertainty we steer away from a collision between courts of state and nation when harmony can be attained without the sacrifice of ends of national importance. No question as to a rule of the law

merchant is present in this case. Swift v. Tyson, 16 Pet. 1, 10 L. Ed. 865. No question is here as to any general principle of the law of contracts of insurance, (Carpenter v. Providence Washington Ins. Co., 16 Pet. 495, 511, 10 L. Ed. 1044, 1051; Aetna Life Ins. Co. v. Moore 231 U. S. 543, 559, 58 L. Ed. 356, 366, 34 S. Ct. 186), with consequences broader than those involved in the construction of a highly specialized condition. All that is here for our decision is the meaning, the tacit implications of a particular set of words, which, as experience has shown, may yield a different answer to this reader and to that one. With choice so 'balanced with doubt,' we accept as our guide the law declared by the state where the contract had its beginning. Trainor v. Aetna Casualty & Surety Co., 290 U. S. 47, 54, 78 L. Ed. 162, 165, 166, 54 S. Ct. 1; Sim v. Edenborn, 242 U. S. 131, 135, 61 L. Ed. 199, 203, 37 S. Ct. 36; Community Bldg. Co. v. Maryland Cas. Co. (C. C. A. 9), 8 Fed. (2) 678, 680; Fordson Coal Co. v. Kentucky River Coal Corp., (C. C. A. 6), 69 Fed. (2) 131, 132."

The rule should be very easily applied in the present case, for that the Mississippi law is in accord with the respondent's theory of the case, and, as we shall hereafter point out, in accord with the great weight of authority, both state and federal.

The Supreme Court of Mississippi, in the case of Metropolitan Ins. Co. v. Lambert, 128 So. 750, 157 Miss. 759, held that under a $2000.00 life policy, providing for

monthly payments for total disability, the insured, totally disabled, could recover only unpaid monthly installments. In that case, the insured, while employed by the Mississippi Central Railroad Company, suffered a fracture of the wrist, of a serious character. The wound healed, but he was unable to use his hand thereafter. The insurance company denied liability under the total and permanent disability clause of the policy, and alleged that the insured's disability was partial and not total. In bringing his suit, the insured asked for not only the installments that were then due him by the insurance company, but also for all future installments under his policy. The jury returned a verdict for the insured without designating the amount of his recovery, and the court entered a judgment thereon for $2000.00. The Supreme Court of Mississippi reversed this holding of the lower court, and used the following language:

> "The appellee's policy was for two thousand dollars, but payable, in the event of his becoming totally disabled, in forty monthly installments of $52.50 each. The jury returned a verdict for the appellee, without designating the amount of his recovery, and the court entered a judgment thereon for two thousand dollars. This was error. The declaration alleges the failure of the appellant to pay any of the monthly installments accrued under the policy; and while it prays for a recovery in the sum of two thousand dollars, the only recovery to which appellee was entitled was for the unpaid monthly installments of $52.50 each; and a judgment should have been entered for the aggregate thereof, with accrued interest, only.

"For this error, the judgment of the court will be set aside, and a proper judgment will be entered here."

The rule was re-examined and affirmed by the Supreme Court of Mississippi in the case of **Atlantic Life Co. v. Serio**, 157 So. 474.

POINT II.

The decision of the Circuit Court of Appeals not in conflict with prior decisions of this Court.

The doctrine of anticipatory breach from time immemorial has been one of limited operation. A complete investigation of the common law as far back as **Rochester v. De La Tour**, 2 El. Bl. 678, shows that one party to a contract will be allowed to sue for complete damages for a breach of a contract before such breach occurs only in three cases, to-wit: Contracts to manufacture and sell goods; Contracts of marriage; and Contracts for personal services.

The case of **Rhoem v. Horst**, 178 U. S. 1, 44 L. Ed. 953, was a breach of an executory contract for the sale of merchandise. The contract was executory, and the buyer gave notice to the seller that no further acceptance of shipments under the contracts would be received. The Court held that suit might be brought for an anticipatory breach of the contract, using the following language:

"And the doctrine that there may be an anticipatory breach of an executory contract by an absolute refusal to perform has become the settled law of England as applied to contracts for services,

for marriage, and for the manufacture or sale of goods. The cases are extensively commented on in the notes to Cutter v. Powell, 2 Smith, Lead. Cas. 1212, 1220, 9th ed., by Richard Henn Collings and Arbuthnot. Some of these, though quite familiar, may well be referred to."

The Court permitted recovery, holding that there was no material distinction between a renunciation of the obligation of a contract already in the course of performance and a complete renunciation before the arrival of the time for performance. But the court took care to make it clear that the doctrine of anticipatory breach would only be applied to contracts containing mutually executory obligations, and would not be applied to a money contract such as a bond or note, because in those cases one party had fully performed his obligations. The court, speaking through Mr. Chief Justice Fuller, quoting a decision of Mr. Chief Justice Toney, in the case of Greenway v. Gaither, Federal Cases No. 5788, said:

"It has never been supposed that notice to the holder of a bond, or a promissory note, or bill of exchange, that the party would not (from any cause) comply with the contract, would give to the holder an immediate cause of action upon which he might sue before the time of payment arrived. In the case of an ordinary money contract, such as a promissory note, or a bond, the consideration has passed; there are no mutual obligations; and cases of that sort do not fall within the reason of the rule."

Liability for an anticipatory breach rests upon the philosophy that since the contract at the time of the repudiation thereof was executory upon each side, the injured party would have no right of action of enforcing the original agreement, or suing thereupon, because the time for performance had not arrived. Therefore, as an exception to the general rule, in order to prevent the injured party from being totally deprived of a present remedy, the doctrine of anticipatory breach as a matter of necessity presented itself. As before stated, however, the doctrine from time immemorial was of limited application, relating solely to controversies of a special nature, such as above set out. An effort to extend the doctrine, as in the instant case, to the payment of fixed sums of money due at stated intervals is a departure from the original principles upon which the action was founded. Notwithstanding that, however, as will appear from the authorities hereinafter cited, as a condition precedent to the right of action, the contract must have been executory upon both sides, (though it might be partially completed by one of the parties), accompanied by a refusal of the opposite party to perform the contract before default. In this case, we have neither of the requisite conditions:

(a) The petitioner's declaration in each case, as well as the undisputed proof, shows that the contract was completely performed so far as the petitioner was concerned. The petitioner alleges that due and proper proof of his total and permanent disability had been given to the respondent. Assuming that to be true, it became the duty of the respondent to make the monthly payments. The petitioner, however, was required to do nothing further.

The petitioner might instantly have sued for monthly disability payments. The lack of such right is what gives rise to the doctrine of anticipatory breach.

(b) Neither was the second requisite present. The respondent, at no time, repudiated its contract with the petitioner; it always admitted that the petitioner was the holder of two outstanding policies of life insurance, both of which were perfectly valid. It was respondent's claim, not that the contracts of insurance were invalid, but that the occasion had not arisen when the petitioner had the right to require the payment of monthly disability claims, in that he was not in a condition of total and permanent disability. Going a step further, the petitioner having submitted proof of continued total disability, the time for performance on the part of the respondent had arisen, and petitioner might sue upon the contract, so the principles of anticipatory breach did not apply.

The case of **Lovell v. St. Louis Mut. Life Ins. Co.**, 111 U. S. 264, 28 L. Ed. 423, bears no relation whatever to this case. There, the company agreed with the assured that after three full annual premiums were paid, if default should be made in the payment of a premium, a paid up policy would be issued to him for the amount of insurance which the premium would purchase. After paying three full premiums, the assured surrendered the policy to the company, with the request that such a policy should be issued to him. The company took the policy and kept it. In the mean time, it sold out to an entirely different company, which returned the policy to the assured with the endorsement that the policy was in force for a stipulated amount, provided interest on the assured's notes was paid.

The court held that this was a breach of the contract, and that the plaintiff might recover of and from the reinsuring company whatever he was entitled to under said contract with the original comapny. The assured was never at any time at fault in the performance of his obligation.

In the case of Pearce v. Tenn. R. R. Co., 173 U. S. 1, 43 L. Ed. 591, the plaintiff—appellant—was injured while in the employ of the appellee railroad company, and, in settlement of his claim for injuries, the railroad company agreed to employ him for the remainder of his life at a stipulated wage. This agreement was carried out by the railroad company for several years. Thereafter, the railroad company completely repudiated all liability to the plaintiff, and the plaintiff brought suit against the company for all damages sustained, or to be sustained, treating the contract as terminated. The contract was executory upon both sides, and being so executory, the railroad company having repudiated the entire contract, this court held that the plaintiff should be permitted to recover, using the following language:

> "If these facts were proved to the satisfaction of the jury, the case would stand thus: The defendant committed an absolute breach of the contract at a time when the plaintiff was entitled to require performance. The plaintiff was not bound to wait to see if the defendant would change its decision, and take him back into its service; or to resort to successive actions for damages from time to time; or to leave the whole of his damages to be recovered by his personal representative after his

death. But he had the right to elect to treat the contract as absolutely and finally broken by the defendant; to maintain this action, once for all, as for a total breach of the entire contract; and to recover all that he would have received in the future, as well as in the past, if the contract had been kept. In so doing, he would simply recover the value of the contract to him at the time of the breach of the contract."

In that case, there were mutual obligatory covenants, that of the plaintiff to perform services for the defendant throughout his natural life; that of the defendant to give the plaintiff employment and pay the agreed compensation. There, while the contract was still executory,—executory on the part of the plaintiff, in that it was the duty of the plaintiff to continue to serve the defendant throughout his life time,—executory on the part of the defendant, in that it was the duty of defendant to give to the plaintiff employment throughout his life time and compensate him therefor,—the defendant repudiated the binding effect of the entire contract upon it, and discharged the plaintiff from its employ and ejected him from its premises.

Assuming that the doctrine of anticipatory breach has any application whatsoever to a contract providing for the payment of monthly disability payments conditioned upon the physical total and permanent disability of the assured, in the instant case, the petitioner, according to the allegations of his own declaration and the undisputed proof, had completely executed the contract so far as he was concerned.

The case of Kelly v. Security Mutual Life Ins. Co., 78 N. E. 584, 186 N. Y. 16, was quoted with approval in the case of Killian v. Met. Life Ins. Co., 251 N. Y. 44. In that case, the court needed to define the word "contest" under a provision of the policy that the policy was incontestable after two years. The defendant company had denied liability within two years, but had taken no steps in regard to contesting the same, and no suit had been brought thereon. In the opinion, written by Judge Cardozo, the court said:

> "Repudiation of a policy is notice that a contest will ensue, if insured or beneficiary shall make attempt thereafter to enforce a claim of right. It is not a contest of itself. Repudiation before maturity (the subject of the contract being a policy of insurance) is not even such a breach as will sustain a remedy at law for the recovery of damages, (Kelly v. Secur. Mut. Life Ins. Co., 186 N. Y. 16), though it may be the occasion for a declaratory judgment or other remedy in equity."

The foregoing rule is very applicable to the present case. The petitioner would have the right, on the equity side of the federal court, to require specific performance upon the part of the insurer, and would doubtless be entitled to obtain a declaratory judgment in connection therewith, making it the duty of the insurer to waive the payment of premiums and pay monthly disability claims during the period of the disability, which would afford to the assured an adequate remedy, and complete protection.

POINT III.

(a) The opinion of the Circuit Court of Appeals in the instant case does not conflict with the decision of the Court of Appeals of any other Circuit.

Federal Life Ins. Co. v. Rascoe, (C. C. A. 6), 12 Fed. (2), 693. The plaintiff there held an accident policy which agreed to pay him the sum of $25.00 per week during the continuance of total disability caused by accidental injuries sustained while a passenger on a common carrier. The plaintiff submitted proofs of such accident and disability, and the defendant made a number of payments, and then refused to make further payments. The plaintiff sued, not only for installments alleged to have accrued, but also for the value of future installments. It appeared, however, that the policy required the plaintiff to furnish defendant, insurance company, medical reports every thirty days, showing his or her condition, and the continued existence of the disability. It does not appear that this was an obligation only to be performed on request, but a positive duty incumbent upon the plaintiff every thirty days. The majority opinion makes express reference to the fact that it was shown by the petition that plaintiff had furnished the defendant, regularly, every thirty days, a report of her attending physician, showing her condition, and that, by reason of such fact, the contract was not wholly performed on her part, but was still executory. The cause was submitted to the court without a jury; no finding of fact or conclusions of law were asked or made, and, as a result, the record is in a very unsatisfactory state. The court permitted recovery, not only of past due installments, but of a sum which included either prospective fu-

ture installments or their present value. The court said that since there was no separate finding of fact, the appellate court had no authority to review the evidence or questions of law presented. The court said, furthermore, that except for plaintiff's disabling injuries, she was in good health, and was likely to live out her expectancy. The court invoked the rule by holding that the requirement of periodic proofs made the contract executory. In rendering the opinion, the court explained its holding in the following language:

> "In this case, the plaintiff does not rely upon the anticipatory breach, nor upon mere delay, neglect or default to pay the several installments due under the terms of this contract, but upon an actual breach, after full proofs of continuing disability had been made in the manner and form specially provided in the policy, coupled with an actual repudiation of the entire contract. A jury was waived, and the trial court found on the issues joined for the plaintiff. Tri-Bullion Smelting Co. v. Jacobson, 233 Fed. 646, 147 C. C. A. 454. There are no separate findings of fact, and this court has no authority to review the evidence or question of law presented by it. Law v. U. S., supra. But, even if this court could accept the opinion of the trial court, in connection with the motion for a new trial, as a separate finding of fact, it appears therefrom that the courts specially found that defendant was acting in bad faith; that it was guilty of an actual breach and an unequivocal repudiation of the entire contract."

In the above mentioned case, there was a strong dissent on the part of Judge Denison, and an ably written dissenting opinion, to which we call the Court's attention:

> "The parties made a contract by which, in the event of the plaintiff's injury, defendant was to perform at future periods. The judgment, upon the theory of anticipatory breach, has transformed it into a contract for present performance. Unless there is clear and satisfactory reason, according to settled legal principles, the defendant should not be held liable for not doing something which it never agreed to do, and this is as true in regard to time of performance as to other particulars. A plaintiff who wants now a payment which he agreed to wait for until next year, should show a clear right, not a doubtful one.
>
> "Roehm v. Horst is the leading case in the United States. It declares that, where a contract executory on both sides is repudiated by one party, the other may presently have his damages assessed as for an anticipatory breach; but it excepts from that rule cases where the contract on the plaintiff's part is not executory. The exception can not be interrupted and applied without understanding the reason for it, and search for the reason for the exception must take us to the reason for the rule. This is not satisfactorily developed, as I think, in any judicial text-book discussion which I have seen. The suggestion that there is an implied contract to keep the express contract in force, and that damages of this character are

really assessed for breach of this implied contract, seems to me to be going a long way for an answer. To my mind, the most forceable reason for the rule of anticipatory damages is this: In the ordinary case of mutually dependent executory contracts, the plaintiff may say to defendant: 'True, I have no right to claim damages now for your non-performance of what you agreed to do next year; but the meritorious reason for my inability is that you are not obliged to perform your part of next year's contract, unless I also perform my part. Now, by your repudiation, you have put it out of my power further to perform, and hence you can not be permitted to say that you have not received or will not receive that consideration for your future act, and there is no good reason why you should not pay now (less discount) the damages which would accrue next year.'

"If this be the reason for the rule, it explains as well the exception. Where his part of the contract has been executed by the plaintiff, he has nothing to do but wait, and to do so continues to be in his power. His position will not be prejudicially changed by defendant's repudiation; and hence he will have no estoppel to rely upon to precipitate the defendant's obligation. It follows that, not only by its authority, but upon sound principles, the exception made in Roehm v. Horst should be recognized and applied, and not dissipated by hesitant application.

"I do not understand that a contract sued up-

on is executory, as against a plaintiff, unless it binds him to do something, so that an action may lie against him for specific performance, or for nonperformance. By that definition, the contract here sued upon is not executory upon the plaintiff's part. She is merely obliged, from time to time, to furnish evidence, if and when she wishes payment; what she must do is, in kind, like presenting a note for payment at a particular place, although it is more burdensome in degree; after all, it is a condition, not an obligation.

"Further, I do not find in the facts such an absolute repudiation of the contract as justifies the application of the anticipatory breach rule."

We direct the attention of the Court to the fact that the Supreme Court of the State of Mississippi, in **Atlantic Life Ins. Co. v. Serio**, 157 So. 474, adopted as the law in the State of Mississippi the rule announced in the dissenting opinion of Judge Denison. Therefore, we respectfully submit that the case of **Federal Life Ins. Co. v. Rascoe**, 12 Fed. (2), 693, is not in conflict with the decision of the Circuit Court of Appeals in the instant case, for that:

(a) The case was tried in the district court without a jury. There was no finding of fact upon the part of the district judge who heard the case, and the opinion of the Circuit Court of Appeals, Sixth Circuit, expressly held that it was without authority to review the decision. Therefore, the opinion of two members of the court in respect to the rule applicable thereto was obiter dictum, and should not be considered and treated as a judicial opinion upon the question involved.

(b) A majority of the members of the Circuit Court of Appeals for the Sixth Circuit in that case held that, in view of the fact that the plaintiff was required, without any request of the defendant, to appear once a month for examination, the contract was executory, and being so executory, the defendant in its answer had repudiated the entire contract.

(c) In view of the very strong dissenting opinion of Judge Denison, and that, as will appear from the opinion of the Circuit Court of Appeals of the Fifth Circuit in the instant case, the majority opinion has met with such universal disapproval; and, in view of the fact that the dissenting opinion of Judge Denison has met with such universal approval, this court should not treat the majority opinion as a judicial precedent contrary to the opinion of the Circuit Court of Appeals, Fifth Circuit, in the instant case.

In respect to the Rascoe case, the Circuit Court of Appeals, Fifth Circuit, in this case, used the following language:

> "In Federal Life Ins. Co. v. Rascoe, 12 Fed. (2) 693, the doctrine was applied by a divided court to render collectible at once both past and future disability payments as here contended for, and Mobley relies strongly on that case. It has been more conspicuously distinguished and disapproved than followed. In federal courts, see Kithcart v. Met. Life Ins. Co., 1 Fed. Sup. 719; Wyll v. Pacific Mutual Life Ins. Co., 3 Fed. Sup. 483; Mennsen v. Travelers Ins. Co., 5 Fed. Sup. 114;

Ginsburg v. Pacific Mut. Life Ins. Co., 5 Fed. Sup. 296; Hines v. Fed. Mut. Life Ins. Co., 6 Fed. Sup. 692. It seems opposed in principle to the decision in the Eighth Circuit in Moore v. Security Trust & Life Ins. Co., 168 Fed. 496, where, in effect, it is held that while an executory contract of life insurance is capable of anticipatory breach, no contract to pay money is after it has become executed on the part of the promise. In the State of Tennessee, where Rascoe's policy was made and to be performed, the Supreme Court, three years later, held that, on a wrongful suspension of a certificate holder, only his annuity benefits in default, and not future installments, could be recovered. Atkinson v. R. R. Employees Mutual Relief Society, 22 S. W. (2) 631. In Mississippi, under the laws of which state the present policy was issued, Rascoe's case has been expressly disapproved. Atlantic Life Ins. Co. v. Serio, 157 So. 474. That only accrued disability installments could be recovered had been previously held in Metropolitan Life Ins. Co. v. Lambert, 157 Miss. 759, 128 So. 750. Similar holdings on installment insurance benefits have been made in other states, as Woods v. Provident Life & Accident Ins. Co., 42 S. W. (2) 499; and Howard v. Benefit Association of Railway employees, 39 S. W. (2) 657, in Kentucky. In Garbush v. Order of United Commercial Travelers, 228 N. W. 148, the Supreme Court of Minnesota refused to follow Rascoe's case. The Supreme Court of Missouri in Puckett v.

National Annuity Association,—Mo....., 114 S. W. 1039, held that only benefits past due could be recovered, and its Court of Appeals, disapproving the Rascoe case, recently held the same way in Allen v. National Life & Accident Ins. Co., 67 S. W. (2) 534; and Chipley v. National Life & Accident Ins. Co., 67 S. W. (2) 992. The courts of Texas also refuse recovery for installments of insurance not due. New York Life Ins. Co. v. English, 96 Tex. 268; State Life Ins. Co. v. Atkins, 9 S. W. (2) 290."

It will be interesting to observe that in the cases cited, and the list by no means includes all of them, not only is the majority opinion in the Rascoe case disapproved, but the dissenting opinion of Judge Denison actually approved and adopted.

(b) The decision not in conflict with decisions of the Circuit Court of Appeals for the Eighth Circuit.

Mutual Reserve Fund Life Assurance Association v. Fereenbach, (C. C. A. 8), 144 Fed. 342. In that case, the insurer, during the life time of the assured, claimed that the assured's policy was forfeited for nonpayment of premiums, and refused to accept further premiums tendered thereafter. Upon the death of the assured, the plaintiff claimed the full face of the policy plus all premiums paid, and judgment was entered for the assured in the district court for such amount. The Circuit Court of Appeals for the Eighth Circuit, however, held that the plaintiff was entitled to recover the face of the policy less the cost of carrying the same to the maturity thereof. It readily ap-

pears, therefore, that the case sustains no relation to the present case.

Colorado Yule Marble Co. v. Collins, 230 Fed. 78, (C. C. A. 8). In that case, the appellant employed the appellee to do certain construction work for it. After the appellee had proceeded with the performance of the contract, the appellant requested that the work be stopped and refused to permit the appellee to proceed therewith. The appellee sued for accrued estimates on the work as well as the profits which he would have made. The Circuit Court of Appeals justified the recovery, using the following language:

> "As bearing upon the first three of these points, it should be borne in mind that this was a partially executed contract, and a number of the authorities agree that there is a difference between contracts wholly executory and those executed in whole or in part. But in Roehm v. Horst, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953, the Supreme Court, after a most exhaustive consideration of both English and American authorities, held substantially that there was no difference between purely executory and partly executed contracts, and that where one party to a contract clearly and positively announced his contract before any part of it was executed, a cause of action for the loss of profit accrued at once to the other party. That opinion is quite conclusive, so far as it goes, upon this court, as it was upon the District Court."

It will readily appear that there is no conflict between that case and the instant case. There, while the contract

was executory upon both sides, one of the parties prevented further performance on the part of the plaintiff, and the court held that the plaintiff should recover for an anticipatory breach.

The opinion of the Circuit Court of Appeals in the instant case does not conflict with the case of United Press Ass'n v. National Newspapers Ass'n, (C. C. A. 8), 254 Fed. 284. The facts in that case are stated in 237 Fed. 547, from which it will appear that the plaintiff contracted to sell to the defendant, a newspaper publisher, a certain news service for a term of years, to be paid for weekly in advance. While the contract was executory on both sides, the defendant repudiated the same.

(c) The decision of the Circuit Court of Appeals is not in conflict with the decisions of the Ninth Circuit.

The decision of the Circuit Court of Appeals in the instant case does not conflict with the case of Aetna Life Ins. Co. v. Geher, (C. C. A. 9), 50 Fed. (2) 657. In that case, the agent of the appellant insurance company delivered a policy to the assured, which provided that it should not become effective except and unless the first premium was paid. The Insurance Company contended that the policy was delivered to the assured merely for inspection. Concurrently therewith, however, the assured met death, entitling the beneficiary to the benefit of the double indemnity of the policy, provided the policy was in force. The company denied all liability under the policy, claiming the benefit of the provisions therein contained to the effect that the policy was not to become effective except and unless the first annual premium was paid in cash. Under the Civil Code of California, however, (see page 658), the

delivery of the policy made the same effective. The court held that recovery might be had upon the policies without making proof of death, and without waiting to the end of what is known as the endowment term. In other words, that the beneficiary was entitled to sue immediately. In that case, it will be noted, however, that there are the following differences:

(a) The California statute invalidated the Clause in the policy that the policy should not become effective.

(b) The defendant insurance company fully and completely repudiated, in the most absolute terms, the obligation:

(c) It will be further noted that the assured was dead, and the beneficiaries were permitted to recover the benefits under the policy without waiting until the maturity thereof; that is to say, the expiration of the term time period.

(d) The decision of the Circuit Court of Appeals, Fifth Circuit, does not conflict with the decisions of the Tenth Circuit.

Prudential Ins. Co. of America v. Faulkner, (C. C. A. 10), 68 Fed. (2) 676, was a case where, under a disability policy, defendant had at its option either one of two methods of paying,—paying by the month or paying in a lump sum. When it repudiated the contract and refused to pay according to either method, and its liability being settled, the court held that it had waived its right to elect its method of settlement. The court used the following language:

> "It has been held that recovery can not be had for future installments, Borinson v. Exempt

Fire Co., 103 Cal. 1, 36 Pac. 955, 24 L. R. A. 715, 42 Am. St. Rep. 93; Mid-Continent Life Ins. Co. v. Walker, 128 Okl. 75, 260 Pac. 1109; Atkinson v. R. R. Employees Mut. Rel. Society, 160 Tenn. 158, 22 S. W. (2) 631. But in those cases and others to the same effect, only one method of payment was provided. No question of the right of a party to exercise the privilege of election between two methods of payment after breach of the contract was involved or decided. And recovery in advance of the due date likewise has been denied unless the contract be executory on both sides; that is, requiring future performance of interdependent obligations. Roehm v. Horst, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953; Moore v. Security Trust & Life Ins. Co. (C. C. A. 8), 168 Fed. 496; Parks v. Maryland Cas. Co., (D. C.) 59 Fed. (2) 736; Kithcart v. Metropolitan Life Ins. Co. (D. C.) 1 Fed. Supp. 719; Wyll v. Pacific Mut. Life Ins. Co., (D. C.) 3 Fed. Supp. 483. But that question is not involved or decided here. We do not hold that plaintiff is entitled to recover for future installments, or in damages measured by their present value. Our conclusion is that its failure to pay the insured within time and in the manner specified in either method, by allowing such time to pass long since, thereby breaching the contract, defendant surrendered its right to select between the two methods."

(c) The opinion of the Circuit Court of Appeals was not in conflict with the general law on the subject.

The following opinions from state courts directly support the decision of the Circuit Court of Appeals for the Fifth Circuit in the instant case:

ARKANSAS: Mutual Life Ins. Co. v. March, 56 S. W. (2) 433; Mass. Protective Ass'n v. Jurney, 68 S. W. (2) 455.

KENTUCKY: Woods v. Provident Life and Accident Ins. Co., 42 S. W. (2), 499; Howard v. Benefit Ass'n, 39 S. W. (2) 657.

MINNESOTA: In the case of Garbush v. Order of Commercial Travelers of America, 228 N. W. 148, the Supreme Court of Minnesota expressly refused to follow the decision of the majority of the court in the case of Federal Life Ins. Co. v. Rascoe, supra, but chose to follow the well-reasoned dissenting opinion of Judge Denison. The court, speaking through Mr. Justice Hilton, said:

> "Defendant cited Federal Life Ins. Co. v. Rascoe, (C. C. A.), 12 Fed. (2) 693, in support of its contention that suit covering the $1300.00 could have been brought at once after disallowance of claim. The majority opinion in that case supports defendant's position. We, however, do not agree. Our view is in accord with a strong dissenting opinion of Judge Denison, in so far as the same is applicable to the present case. Here, there is an executory contract where there is nothing for plaintiff to perform."

MISSOURI: Puckett v. National Annuity Ass'n, 114 S. W. 1039.

NEW YORK: In the case of **Kelly v. Security Mutual Ins. Co.**, (Court of Appeals of New York), 78 N. E. 584, the court refused to establish the rule that the anticipatory breach of an insurance contract rendered the insurance company personally liable for damages to the insured, although the date of payment was not then due, and said:

> "An attempt to repudiate such a contract does not make it due. If the maker of a promissory note, given for borrowed money, and due one year after date, notifies the holder the next day that he repudiates it and will not pay it, can the holder sue at once? Can a mortgagor make his mortgage due before the law day by repudiating it in advance? The rule that renunciation of a continuous executory contract by one party before the day of performance gives the other party the right to sue at once for damages, is usually applied only to contracts of special character, even in the jurisdiction where it obtains at all. It is not generally applied to contracts for the payment of money at a future time, and in some states the principle is not recognized in any way whatever. Daniels v. Newton, 114 Mass. 530, 19 Am. Rep. 384; Stanford v. McDill, 6 N. D. 536, 72 N. W. 938, 38 L. R. A. 760; Carstens v. McDonald, 38 Neb. 838, 57 N. W. 757; King v. Waterman, 55 Neb. 324, 75 N. W. 830. In other states and in the Federal courts, the principle is adopted but applied with caution. Roehm v. Horst, 178 U. S. 1, 17, 18, 20 S. Ct. 780, 44 L. Ed. 953; Schmidt v. Schnell, 7 O. Dec. 657; Brown v. Odill, 104 Tenn.

250, 56 S. W. 840, 52 L. R. A. 660; Reedling's Sons v. Fence Co., 130 Ill. 660, 22 N. E. 518; Unexcelled Fire Works Co. v. Polites, 130 Pa. 536, 18 Atl. 1058, 17 Am. St. Rep. 788. In this state, it seems to be limited to contracts to marry, (Burtis v. Thompson, 42 N. Y. 236, 1 Am. Rep. 516;) for personal services (Howard v. Daly, 61 N. Y. 362, 19 Am. Rep. 285) and for the manufacture or sale of goods (Windmuller v. Pope, 107 N. Y. 674, 14 N. E. 436; Nichols v. Scranton Steel Co., 137 N. Y. 471, 33 N. E. 561). At least we have not extended it to mutual life insurance policies, perhaps for the reason that the question of fact opened to unscrupulous persons by such extension might undermine the solvency of the company and inflict gross injustice upon the other policyholders."

In **Forlen v. Fidelity & Casualty Co.**, 192 N. Y. Sup., 513, the insured was disabled by insanity. Suit was brought for the commuted value of all installments based upon the life expectancy of the insured. The court held that the policy itself provided when, and how, and under what circumstances, payments would be made, and the provisions in this case were that it was evidently the intention of the parties to pay only at the stated time, and plaintiff could recover nothing in addition thereto. The court suggested, furthermore, that there was no such refusal or denial of liability as would in any event furnish grounds for damages. The court used the following language:

"The proof shows that she is suffering from an incurable malady, and based upon the assumption that the incompetent would never fully re-

cover, this action was brought to recover an amount to be based upon the expectance of life of the incompetent, as shown by the Northhampton Tables, the defendant having first disclaimed all liability under the policy. Plaintiff can not, however, succeed on this branch of the case. The policy states definitely when and under what circumstances the defendant is required to pay, and its refusal to pay the full amount of the weekly indemnity specified in the policy, based upon its belief that the plaintiff is not entitled to the maximum of such weekly benefits, is not such a refusal to pay or such a denial of its liability as would in any event furnish grounds for an action to recover the full amount of the loss at this time. But, aside from that reason, the policy states definitely when and under what circumstances the weekly indemnity is to be paid, and the plaintiff can not recover in this action the full amount of plaintiff's demand based upon her expectance of life. It was the intention of the parties, as evidenced by the policy, to pay only at the time and in the manner specified in the policy."

NORTH CAROLINA: Green v. Inter-Ocean Casualty Co., 167 S. E. 38; Rayburn v. Casualty Co., 54 S. E. 283.

TENNESSEE: Atkinson v. R. R. Employees Mutual Relief Society, 22 S. W. 631.

TEXAS: New York Life Ins. Co. v. English, 72 S. W. 58; State Life Ins. Co. v. Atkins, 9 S. W. (2) 290.

The American Law Institute, Restatement of the Law of Contracts, paragraph 318, announces the following rule:

> "318. Anticipatory Repudiation as a Total Breach.
>
> "Except in the cases of a contract originally unilateral, and not conditional on some future performance by the promisee, and of a contract originally bilateral that has become unilateral and similarly unconditional by full performance by one party, any of the following facts, done without justification by a promisor in a contract before he has committed a breach under the rules stated in Section 314-315, constitutes an anticipatory repudiation which is a total breach of contract:
>
> "(a) A positive statement to the promisee or other person having a right under the contract, indicating that the promisor will not or can not substantially perform his contractual duties."

The same rule is announced in Williston on Contracts, Vol. III, Section 1329, page 2382; Page on Contracts, Vol. V. Section 2891, page 5107.

POINT IV.

SUMMARY

We respectfully submit that the petition for writ of certiorari should be denied in this case:

(a) The doctrine of anticipatory breach is of limited application, and has usually been confined to breach of contracts to manufacture and sell commodities, contracts

of marriage and contracts of personal service. The doctrine has no application to definite and fixed sums of money payable at stated periods of time.

(b) If the doctrine of anticipatory breach shall be held to apply to life insurance contracts, liability thereupon should be predicated upon fixed and well-recognized legal principles. There must be a total, unconditional, unambiguous repudiation of the entire contract while the contract is executory upon both sides. In the instant case, the contract was totally executed so far as the petitioner is concerned. The petitioner might have sued at any time since February 13, 1933, for monthly disability payments. The contract was fully executed upon the part of the petitioner. Neither was there any repudiation of the policies upon the part of the respondent. The respondent merely took the position that the petitioner was not totally and permanently disabled within the meaning of the policy; that the petitioner was still doing some work without injury to himself, notwithstanding his disability. The respondent recognized the validity and the binding effect of the outstanding policy. The respondent did not deny that the policies were in existence. The respondent merely took the position that the time had not arrived when the petitioner was entitled to collect monthly disability payments or to have waiver of premiums thereupon. The respondent never denied liability to the petitioner, if in fact the petitioner was totally and permanently disabled.

Petitioner's counsel call attention to the fact that as to policy 10,840,538, on March 1, 1933, respondent took the position that the petitioner was not continuously totally disabled, and that the premium falling due February 7,

1933, should be paid, (R. 159); and upon April 13, 1933, the premium not having been paid, advised the petitioner to become reinstated for which purpose a blank was inclosed him, (R. 163); and upon June 5, 1933, there having been no application for reinstatement, petitioner was advised that the reserve in the policy had been applied to purchase continued insurance. (R. 164-165). As to policy 7,802,419, on June 9, 1933, notice of premium July 9, 1933, was sent to the petitioner, (R. 165). However, the thirty days of grace would carry the policy until August 9, 1933, on which date, upon reconsideration of the claim, premium receipts on each policy were issued, (R. 172). Respondent was not repudiating the petitioner's contracts of insurance by such action, but assuming as it did that the petitioner was not continuously disabled within the meaning of the policy, it was invoking the very terms of the policies themselves. Payment of the premiums was the essence of the policy. **Bergholm v. Peoria Life Ins. Co.**, 76 L. Ed. 416, 284 U. S. 489.

There was no statute in Mississippi requiring nor did the policy require, that any written notice be given the petitioner thereof. The respondent was merely calling the petitioner's attention to the consequences which would follow nonpayment of premiums, assuming that he did not continue totally disabled, and assuming as it did that he was not totally and permanently disabled within the meaning of the policy. The respondent was reaffirming, rather than repudiating, the policy.

The respondent is a mutual company, and the policies were participating policies, with very valuable rights.

Policy 10,340,538 was automatically carried, by reason of its reserve, to June 20, 1937, without the payment of any premiums, (R. 164); this period may be beyond the life of the insured, but certainly, the respondent was not repudiating the contract. That question was presented in the case of **Kimel v. Missouri State Life Ins. Co.**, 71 Fed. (2) 923. In that case, the insurer in violation of its contract with the assured, refused to waive the payment of premium, but made an endorsement upon the policy, charging the premium to the policy, with interest thereupon. The court, in passing upon the question, used the following language:

> "An offer to perform in accordance with the promisor's interpretation of the contract, although erroneous, if made in good faith, is not such a clear and unequivocal refusal to perform as amounts to a renunciation giving rise to an anticipatory breach.
>
> "As stated in Armstrong v. Ross, 61 W. Va. 38, 55, S. E. 895, 899: 'If this were not the law, it would be a dangerous thing to stand upon a controverted construction of a contract. Every man would act at his peril in such cases, and be subjected to the alternative of acquiescing in the interpretation adopted by his opponent, or putting to hazard his entire interest in the contract. The courts have never imposed terms so harsh or burdens of such weight. It would amount to a virtual denial of the right to insist upon an honest, but erroneous, interpretation."

For, as here, the assured was demanding of the company more than he was entitled to. As early as March 9, 1933, (R. 160-161), petitioner's council demanded $28,980.00

from the respondent. The respondent had done nothing but indicate that the assured was not totally and permanently disabled, and that the premium maturing on Policy 10,340,538 February 7, 1933, which should be paid by the 7th of March, 1933, was due. At that time, the premium under Policy 7,802,419 was paid up to July 7, 1933, and the premium was not requested until June 7, 1933, (R. 164). The utmost that may be said about the situation is that the parties differed about their legal rights. The petitioner expressly admitted, of record, that the respondent was not guilty of any bad faith, (R. 186-187). The respondent offered to prove by Frank S. Lantry, Chairman of Disability Claims Committee, that the company had to be very careful in respect to these claims, in that such claims present a wide opportunity for fictitious claims. The respondent offered to prove such fact in order to deny any imputation of bad faith. Petitioner's counsel admitted, of record, that the question of good faith was not involved; it was simply a question of breach of contract. (R. 187).

In the instant case, the Circuit Court of Appeals said that the respondent was not repudiating its contract. Upon the other hand, it was invoking the express terms thereof. The court used the following language:

> "And for another reason, there could here be no recovery. In order to constitute an anticipatory breach of the entire contract, there must be a clear and unequivocal repudiation by the promisor of all that remains to be performed, a refusal to be further bound by the contract. Dingley v. Oler, 117 U. S. 496; Roehm v. Horst, 178 U. S. 1; Kimel v. Missouri State Life Ins. Co., 71 Fed.

(2) 921, and cases cited. A reading of the correspondence above set out disclose that at no time did the Insurance Company renounce or repudiate its policies, but founded everything it did upon the terms of them. Even its declaration of lapse and invitation to reinstatement were no repudiation, but in pursuance of their express provisions. All that happened was that the company misjudged its obligations. Such an error made in good faith, whether founded in mistake of law or fact, is not repudiation, and does not end a continuing contract, but calls only for its enforcement according to its terms. Mutual Life Ins. Co. v. March, 56 S. W. (2) 433; Massachusetts Protective Ass'n. v. Jurney, 68 S. W. (2) 455. In this case, the company acknowledged its error and tendered full compensation, together with costs. The insured had no right to anything more."

Dealing with the same argument, Judge Denison, in the dissenting opinion in the Rascoe case, used the following language:

"Such a repudiation can not be found in the final cancellation made by the insurance company; that cancellation was an act in express pursuance of the contract, and not in repudiation of it; it was a termination of future liability, and not at all a repudiation of any accrued and existing obligation. Nor can it be found, as I think, in the refusal to pay. What defendant really did was to deny that there was any breach which had obligated it

to pay or which obligated it to pay any more. Defendant never has questioned the entire validity of the contract, or denied its continuing liability to pay anything which, under the contract, it ought to pay. While there are decisions which find the necessary basis in a mere denial or breach, I doubt whether they give due regard to what ought to be the character of a repudiation effective to create an obligation inconsistent with the express terms of the contract. In my judgment, this case illustrates the evil of laxity in permitting a premature recovery. In such a case as this (as facts often are, though possibly not in this case), plaintiff in a year or two may recover entirely, or (if the case is as bad as here claimed) is very likely not to live long. In either case, the true liability is for a short term; but the recovery has been upon the basis of the full expectation of life of a healthy person,—though no error in this respect was duly saved."

(c) The decision in the instant case does not conflict with, and is not contrary to the rule announced in any opinion of this court, as will appear from the foregoing argument.

(d) The opinion in the instant case is not contrary to the decision of the Eighth Circuit in the Rascoe case within the meaning of Rule 38 of this court governing the granting of writs of certiorari, for that:

(a) There was no finding of facts by the District Judge, and the record presents no case wherein it was appropriate for the court to announce a rule of law dealing with the question, and the opinion is purely obiter dictum.

(b) The majority opinion held that there was a complete repudiation of the entire contract while the same was still executory on both sides.

(c) The dissenting opinion of Judge Denison is so apparently a correct statement of the rule, and has been cited with approval with such practical unanimity as to destroy the effect of the majority opinion, so that the same is no longer a judicial precedent within the meaning of Rule 38 of this court.

(d) The opinion in the Rascoe case has been, with absolute uniformity, rejected by every court where the same has been brought under review.

(e) The opinion in the Rascoe case is in conflict with and contrary to all the opinions on the subject by this court.

(f) The opinion in the Rascoe case is contrary to the law in the State of Mississippi, where the contract was made. The Supreme Court of Mississippi has repudiated the majority opinion, and adopted Judge Denison's dissenting opinion.

(g) The majority opinion in the Rascoe case is opposed to the great weight of authority in this country dealing with the identical question, and is contrary to the announcement contained in the American Law Institute Restatement of the Law of Contracts upon the question of anticipatory breach.

We respectfully submit that the question of the granting of the writ of certiorari by this court is discretionary, and by reason of the things herein stated and the authorities cited, this record presents no appropriate occasion for the exercise by this court of such right. We submit that the petition should be denied.

Respectfully submitted,

LOUIS H. COOKE,

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P. H. EAGER, JR.,

Counsel for Respondent.

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In The
Supreme Court of the United States.

OCTOBER TERM, 1934

NO. 751

Roy T. Mobley, Petitioner,

vs.

The New York Life Insurance Company.

STATEMENT AND BRIEF FOR THE APPELLEE.

The appellee is of the opinion that this cause requires a more adequate statement than is contained in appellant's brief.

Prior to December 1st, 1930, the New York Life Insurance Company, appellee, had issued and outstanding upon the life of Roy T. Mobley two policies of life insurance: Policy No. 7,802,419 dated April 9, 1925, in the sum of $2,000, Ordniary Life, the mother of the assured being named as beneficiary; Policy No. 10,340,538 in the sum of $5,000 dated August 7, 1932, in which policy the assured's wife was named beneficiary.

The policies were identical in language except as to the date, face of the policies, and the name of the beneficiary. Therefore, by agreement of counsel, only the last named policy is copied into the Record. (R. 5.)

Said policies provide (conditioned upon payment by the insured of insurance premiums therein stipulated, or upon the assumption thereof by the appellee) that upon

receipt at its home office in New York City, New York, of due proof of the insured's death, the appellee should pay to the beneficiaries the full face of the policies; and in addition to the amounts provided to be paid to the beneficiaries, under said policies, the policies provided for payment of monthly disability benefits in the following language:

"Total and Permanent Disability.

"Disability shall be considered total whenever the Insured is so disabled by bodily injury or disease that he is wholly prevented from performing any work, from following any occupation, or from engaging in any business for remuneration or profit, provided such disability occurred after the insurance under this Policy took effect and before the anniversary of the Policy on which the Insured's age at nearest birthday is sixty.

"Upon receipt at the Company's Home Office, before default in payment of premium, of due proof that the Insured is totally disabled as above defined, and will be continuously so disabled for life, or if the proof submitted is not conclusive as to the permanency of such disability, but establishes that the Insured is, and for a period of not less than three consecutive months immediately preceding receipt of proof has been, totally disabled as above defined, the following benefits will be granted:

"(a) Waiver of Premium.—The Company will waive the payment of any premium falling due during the period of continuous total disability, the premium waived to be the annual, semi-annual or quarterly premium according to the mode of payment in effect when disability occurred.

"(b) Income Payments.—The Company will pay to the Insured the monthly income stated on the first page hereof ($10 per $1,000 of the face value of this Policy) for each (Vol. 9) completed month from the commencement of and during the period of continuous total disability. If disability results from insanity, payment will be made to the beneficiary in lieu of the Insured."

The Company had the right, at intervals, to demand due proof of the continuance of total disability, provided such proof should not be required oftener than once a year after the disability had continued for two full years.

Appellant, upon the 25th day of July, 1933, exhibited his declaration, in the Circuit Court of Harrison County, Mississippi, on Policy No. 10,340,538; and upon the first day of November, 1933, the appellant, before the same Court, filed suit upon the first policy, being No. 7,802,419.

The declarations alleged that the plaintiff had become totally and permanently disabled within the meaning of the policies; that the assured had given to the Company due proof of such total and permanent disability. In fact the declaration alleged full and complete compliance, upon the part of the appellant, with the covenants in the poli-

cies of insurance binding upon him. In other words, it was alleged that the policy contracts were executed so far as he was concerned.

The plaintiff alleged in each declaration that the Company made all payments provided for, under said policies, by reason of such total and permanent disability, up to and including the disability payments maturing January 13, 1933; but that it had failed and refused to pay the monthly payments maturing February 13, 1933; but that upon the other hand, upon March 1, 1933, the Company denied that the appellant continued to be totally and permanently disabled, under said policies, and each of them.

In each of said suits the appellant sued for what is known as an anticipatory breach on the part of the appellee of the terms and provisions of each of said policies. The appellant claimed that by reason of said breach the appellee was indebted to him for the then commuted value of all monthly disability payments under said policies, and each of them, based upon the assumption that the appellant would live out his entire expectancy, aggregating $45,580.00; and appellant, plaintiff, also prayed for judgment for the face of each of said policies. (R. 1-25; R. 31.)

Each of the cases was removed to the District Court of the United States, for the Southern Division of the Southern District of Mississippi.

As to the first suit, being No. 998, on Policy No. 10,340,538, in addition to the General Issue, the appellee filed a Special Plea, (R. 34) wherein it was alleged that the appellant, prior to the 13th day of February, 1931, submitted to it proof, from which it appeared, and the appellee be-

lieved, that for a period of not less than three consecutive months immediately preceding receipt of such proof, the plaintiff was totally disabled as defined in said policies. Whereupon as of January 13, 1931, payable February 13, 1931, the appellee approved the plaintiff's disability claim for $50.00 per month, and waived payments of premiums. That the defendant, appellee, had continued to pay to the appellant, said monthly payment of $50,00 per month, up to and including the payment maturing January 13, 1933.

Said Special Plea further alleged that following the th day of January, 1933, the defendant, appellee, received information, which it believed to be true, that the plaintiff was not totally and permanently disabled, as defined in said policy, by reason of which the defendant, appe. id not pay to the plaintiff, appellant, the disability payment maturing subsequent to the last mentioned date.

In its said Special Plea the appellee alleged that subsequent to February 13, 1933, it took diligent steps to ascertain as to whether or not appellant was totally and permanently disabled, within the meaning of the policy; and set out its correspondence with the appellant, in respect thereto. It alleged that it never denied the validity of the policy in question, but merely took the position that the appellant was not totally and permanently disabled, within the meaning thereof, and, therefore, was not entitled to the monthly disability payments.

The appellee alleged that it continued its investigation with the result that upon July 13, 1933 it requested the appellant to re-submit himself to one of its doctors for examination. Such course was had with the result that the ap-

pellee reached the conclusion that the appellant probably continued totally and permanently disabled, within the meaning of the policy. Whereupon the appellee, after receiving the report of said physician, to-wit—upon the 9th day of August, 1933, tendered to the appellant all monthly disability payments, upon each of said policies, maturing subsequent to the 13th day of January, 1933, and issued a waiver of premiums maturing on each of said policies subsequent to said date.

The appellant, through his counsel, refused to accept said disability payments, and/or waiver of premiums upon said policies, but upon the other hand filed the first suit, on Policy No. 10,340,538, upon the 25th day of July, 1933, the very day upon which the appellant re-submitted himself for examination.

Thereafter, upon the first day of November, 1933, the appellant having filed the second suit, on Policy No. 7,802,419, which suit became No. 1001 on the docket of the United States District Court, the appellee filed a Plea of the General Issue, and Notice thereon, equivalent to its Special Plea under cause No. 998.

The said last mentioned, and second suit, being also removed to the United States District Court, as aforesaid, the two causes were consolidated and tried as one cause. (R. 44.)

The appellee not only, upon August 9, 1933, tendered to appellant all monthly disability payments maturing subsequent to January 13, 1933, which were refused; but tendered all accrued monthly disability payments into Court, with its pleadings, and announced its purpose of continuing to do so, so long as the appellant continued totally disabled, within the meaning of the policy.

At the trial of the cause the appellant introduced the testimony of Dr. J. E. Beck, (R. 74); Dr. Fred S. Gay, (R. 126); Dr. E. A. Copeland, (R. 127); who testified to facts indicating that in their judgment the appellant was totally and permanently disabled.

In order to minimize the Record, for the purposes of the first trial only, the parties entered into an agreed statement of facts, (R. 76, 126.) For the purposes of the trial it was agreed that the appellant might be considered as totally and permanently disabled, at that time. (R. 125).

The facts were not in dispute. In the latter part of December, 1930, the plaintiff underwent an operation for acute appendicitis accompanied by gangrene. Subsequent to the operation, to-wit, on or about the 30th day of March, 1931, the appellant claimed that he was totally and permanently disabled as a result thereof, and propounded a claim for total and permanent disability under each of said policies. (R. 77-78).

Blanks were furnished him with which to make proof of his said claim; he submitted himself to one of the company's examiners for examination, with the result that on or about the 20th of April, 1931, monthly disability claims were allowed and paid to him on each of said policies from January 13, 1931; $50.00 under one policy and $20.00 under the other. The company also waived the payment of maturing premiums. (R. 77-88.)

Upon three occasions between the 13th day of January, 1931 and the 1st day of January, 1933, the appellee expressed doubt as to whether or not the appellant was totally and permanently disabled within the meaning of the policies.

During such period, upon more than one occasion, it took the position that the appellant was no longer totally and permanently disabled within the meaning of the policies, and payments of monthly disability claims were temporarily withheld. In each instance, however, as the result of continued correspondence between the parties, payment of monthly disability claims under each of the policies, accompanied by waiver of premiums maturing upon the policies, was had, with the result that upon the 1st day of February, 1933, all monthly disability claims on each of the policies, including those maturing January 13, 1933, had been paid in full, and the appellee had waived all premiums maturing on the earlier policy up to August 9, 1933, and on the second policy, to the 7th day of March, 1933. (R. 87).

Between the 3rd day of January, 1933, and the 22nd day of February, 1933, the appellee received information from which it was of the opinion that the appellant was not totally and permanently disabled, within the meaning of the policies. (R. 111-112).

Accordingly, upon the first of March, 1933, (R. 113-114) it informed the appellant, by letter, that it would discontinue disability payments upon the policies in question, and that the premium falling due February 7, 1933, was payable in conformity with the policy's requirements.

The continuance of the policies in force was conditioned upon the payment of semi-annual premiums, in advance. (R. 4.) Thirty days' grace was allowed for the payment of premiums, and where default was made the insured was permitted to become re-instated within five years, upon evidence of insurability. (R. 9.)

The policies further provided, however, upon default in payment of premium, after three full premiums had been paid, for the purchase of temporary, extended insurance, through the application of the cash surrender value of the policies. (R. 14-15.)

Whereupon there ensued certain correspondence between the appellant, or his counsel, and the appellee; the appellant insisting that he was totally and permanently disabled, within the meaning of the policies, and the appellee insisting that the appellant was not totally and permanently disabled, but at the same time inviting the appellant to submit additional information in support of his contention. (R. 113-116).

As a result of the foregoing, upon March 9, 1933, appellant's counsel demanded of the appellee damages, growing out of an anticipatory breach of said policies, in the amount of $45,580.00. (R. 115-120.)

Whereupon the Chairman of Appellee's Claim Division, under date of July 12, 1933, (R. 120) suggested to appellant's counsel that he re-submit himself to appellee's local physician, at Lucedale, Mississippi, appellant's place of residence. This the appellant did, upon the 24th day of July, 1933, Dr. Dorsett, the examining physician, reporting that the appellant was suffering from chronic Myocarditis. (R. 121-122).

Within a reasonable time thereafter, to-wit—upon the 9th of August, 1933, the appellee's officers and agents concluded from Dr. Dorsett's report that the appellant was probably totally and permanently disabled, within the policies, and thereupon, without delay, tendered to the appel-

lant all monthly disability payments accrued under each of the policies in question, accompanied by a waiver of premiums which would otherwise be payable, which tender was refused by the appellant. (R. 123, 124, 125.)

The appellee called as a witness one Dr. J. C. Huggins who testified that he examined the appellant in January, 1933, and found no trace of myocarditis; that myocarditis would not prevent a man from doing work of any kind; and that myocarditis was curable; that if a patient was suffering therefrom he would be expected to lose weight, and that the appellant lost none. (R. 132-134.)

The appellee called as a witness Frank S. Lantry, Chairman of the Committee on Disability Claims, who testified that his Committee handled from 15,000 to 25,000 claims per year. That it was not always possible to tell with mathematical accuracy whether the insured was disabled. That the Company regarded this as a border line claim, with reference to the total and permanent disability of the insured. That there were periods during which the Company regarded it as an extremely doubtful claim. That the Company had no information, prior to the report of Dr. Dorsett, made July 24, 1933, that the appellant was suffering from chronic myocarditis. (R. 134-137.)

Whereupon, at the conclusion of the testimony a directed verdict was returned, in favor of the appellee, upon which judgment was entered, disallowing the appellant's suit; but directing, however, that the disability payments tendered into Court, which covered all monthly payments which had accrued up to the date of the trial, be awarded and paid to the appellant. (R. 134-142).

An appeal was prosecuted to the United States Circuit Court of Appeals, for the Fifth Circuit. The judgment was affirmed, 74 Fed. (2d) 588, from which judgment this Court has granted certiorari.

ARGUMENT

POINT I.

ORDINARILY NO ACTION LIES ON AN ANTICIPATORY BREACH OF CONTRACT PROVIDING FOR THE PAYMENT OF STIPULATED SUMS OF MONEY AT DEFINITE PERIODS. IN ANY EVENT, BEFORE THE PRINCIPLE IS APPLICABLE AT ALL THERE MUST HAVE BEEN AN ABSOLUTE, UNCONDITIONAL AND UNAMBIGUOUS REPUDIATION OF THE ENTIRE CONTRACT WHILE EXECUTORY ON BOTH SIDES.

(A) Ordinarily no action lies on an anticipatory breach of contract providing for the payment of stipulated sums of money at definite periods.

The appellant, of course, has no right of action in this case at all unless the appellee is liable on the theory of an anticipatory breach, for that the appellee, on August 9, 1933, shortly after the first suit was filed and before the second one was filed, tendered to the appellant and his counsel full and complete performance by the tender of all disability payments then maturing accompanied by waiver of all premiums maturing up to such date, which tender was declined by the appellant and his counsel because damages growing out of the alleged anticipatory breach were claimed. The appellee made its tender good by paying into court up

to the trial of the case all maturing disability claims accompanied by Waiver of maturing premiums. Not only that, but the appellee in making its tender attached no condition thereto. The appellee was perfectly willing that the appellant, without prejudice to any right accruing by reason of the filing of the suits, might accept disability payments and avail himself of the waiver of premiums.

The doctrine of anticipatory breach from time immemorial has been one of limited operation.

A complete investigation of the common law as far back as **Rochester vs. De La Tour**, 2 El. Bl. 678, shows that one party to a contract will be allowed to sue for complete damages for a breach of a contract before such breach occurs, only in three cases, to-wit: Contracts to manufacture and sell goods; Contracts of marriage; and Contracts for personal services.

Other English cases are: **Avery v. Bowden**, 5 Ellis & Blackburn, 714, decided by Lord Campbell, Chief Justice, in 1855; **Barrick v. Buba**, 2 Common Bench (N. S.) 563, decided in 1857; **Frost v. Knight**, Law Reports, 7 Exch. 111, decided in 1872; **Johnstone v. Milling**, 16 Q. B. D. 460, decided in 1886.

The case of **Roehm vs. Horst**, 171 U. S. 1, 44 L. Ed. 953, was a breach of an executory contract for the sale of merchandise. The contract was executory and the buyer gave notice to the seller that no further acceptance of shipments under the contract would be received. This Court held that suit might be brought for an anticipatory breach of the contract, using the following language:

"And the doctrine that there may be an anticipatory breach of an executory contract by an absolute refusal to perform it has become the settled law of England as applied to contracts for services, for marriage, and for the manufacture or sale of goods. The cases are extensively commented on in the notes in Cutter vs. Powell, 2 Smith, Lead, Cas. 1212, 1220, 9th edition by Richard Henn Collings and Arbuthnot. Some of these, though quite familiar, may well be referred to."

The court took care to make it clear that the doctrine of anticipatory breach would only be applied to contracts containing mutually executory obligations, and would not be applied to a monthly contract such as a bond or note, because in those cases one party had fully performed his obligations. The court, speaking through Mr. Chief Justice Fuller, quoting a decision of Mr. Chief Justice Taney, in the case of Greenway vs. Gaither, Federal Cases No. 5788, said:

"It has never been supposed that notice to the holder of a bond, or a promissory note, or bill of exchange, that the party would not (from any cause) comply with the contract, would give to the holder an immediate cause of action upon which he might sue before the time of payment arrived.

"In the case of an ordinary money contract, such as a promissory note, or a bond, the consideration has passed; there are no mutual obligations; and cases of that sort do not fall within the reason of the rule."

Liability for an anticipatory breach rests upon the philosophy that, since the contract at the time of the repudiation thereof was executory upon each side, the injured party would have no right of action of enforcing the original agreement, or suing thereupon, because the time for performance had not arrived. Therefore, as an exception to the general rule, in order to prevent the injured party from being totally deprived of a present remedy, the doctrine of anticipatory breach as a matter of necessity presented itself. As before stated, however, the doctrine from time immemorial was of limited application relating solely to controversies of a special nature, such as above set out. An effort to extend the doctrine, as in the instant case, to the payment of fixed sums of money due at stated intervals is a departure from the original principles upon which the action was founded.

However, as will appear from the authorities hereinafter cited, as a condition precedent to the right of action, the contract must have been executory upon both sides (though it might be partially completed by one of the parties) accompanied by a refusal of the opposite party to perform the contract before default. In this case we have neither of the requisite conditions. (a) The appellant's declaration in each case, as well as the undisputed proof, shows that the contract was completely performed so far as the appellant was concerned. The plaintiff alleges that due and proper proof had been given to the appellee of his total and permanent disability. Assuming that to be true, it became the duty of the appellee to make the monthly payments. The appellant, however, was required to do nothing further. The appellant might instantly have sued

for monthly disability payments. The lack of such right is what gives rise to the doctrine of anticipatory breach. (b) Neither was the second requisite present. The appellee at no time repudiated its contract with the appellant; it always admitted that the appellant was the holder of two outstanding policies of life insurance, both of which were perfectly valid. It was the appellee's claim, not that the contracts of insurance were invalid, but that the occasion had not arisen when the appellant had the right to require the payment of monthly disability claims, in that he was not in a condition of total and permanent disability. Going a step further, the appellant having submitted proof of continued total disability, the time for performance on the part of appellee had arisen and appellant might sue upon the contract so the principles of anticipatory breach did not apply.

(B) The great weight of authority is against the appellant's right of recovery under the facts in this case.

Some importance has become attached to suits of the character involved in this case by reason of the decision in **Federal Life Insurance Co. v. Rascoe**, C. C. A. 6, 12 Fed. (2d) 693, upon which case the appellant relies to support his theory of recovery. The plaintiff there held an accident policy which agreed to pay her the sum of $25.00 per week during the continuance of total disability caused by accidental injuries sustained while a passenger on a common carrier. The plaintiff submitted proofs of such accident and disability and the defendant made a number of payments and then refused to make further payments. The plaintiff sued, not only for installments alleged to have ac-

cmed, but also for the value of future installments. It appeared, however, that the policy required the plaintiff to furnish defendant, insurance company, medical reports every thirty days, showing his or her condition, and the continued existence of the disability. The cause was submitted to the court without a jury, no finding of fact or conclusions of law were asked or made, and as a result the record is in a very unsatisfactory state. The court permitted recovery, not only of past due installments, but of a sum which included either prospective future installments or their present value. The court said that since there was no separate findings of fact, the appellate court had no authority to review the evidence or questions of law presented. The court said, furthermore, that except for plaintiff's disabling injuries, she was in good health, and was likely to live out her expectancy.

The court invoked the rule by holding that the requirement of periodic proofs made the contract executory, using the following language:

> "In this case the plaintiff does not rely upon the anticipatory breach, nor upon mere delay, neglect, or default to pay the several installments due under the terms of this contract, but upon an actual breach, after full proofs of continuing disability had been made in the manner and form specially provided in the policy, coupled with an actual repudiation of the entire contract. A jury was waived, and the trial court found on the issues joined for the plaintiff. Tri-Bullion Smelting Co. v. Jacobson, 233 F. 646, 147 C. C. A. 454. There are no separate findings of fact, and this court has

> no authority to review the evidence or question of law presented by it. Law v. U. S.; supra. But, even if this court could accept the opinion of the trial court, in connection with the motion for a new trial, as a separate finding of fact, it appears therefrom that the courts specially found that defendant was acting in bad faith; that it was guilty of an actual breach and an unequivocal repudiation of the entire contract."

This decision has met with much adverse comment from other courts, federal and state. We know of no case where the doctrine announced has been approved. It is interesting to note, however, that the dissenting opinion of Judge Denison in lieu of the majority opinion has been most favorably received and adopted by a number of courts as stating the correct rule. The opinion of Judge Denison will be found Page 697, and his dissent is based upon the following propositions: (1) that the appellant insurance company had only agreed to pay the plaintiff at monthly periods and that the appellant insurance company should not be held liable for not doing something which it never agreed to do; (2) that the contract was not executory on the part of the plaintiff. All the plaintiff had to do was to wait and could not be damaged by the defendant's refusal to pay; (3) that there was no repudiation of the contract upon the part of the defendant insurance company. It was true that the insurance company had advised the assured that the policy had lapsed for failure to pay premiums thereupon, as to which the defendant was invoking an express provision of the contract and not repudiating the same, that the defendant company had never

denied the validity or binding effect of the contract, had merely taken the position that the time had not arrived when the plaintiff was entitled to the payment of monthly disability claims; (4) that it was utterly unjust to permit the plaintiff to recover upon the basis that she would live throughout her expectancy, whereas, as a matter of fact, she might get well in a short time, or die within a short period. In either case the true liability would be for a shorter period.

We now invite the attention of the court to the decisions dealing with the particular question involved herein as to whether or not an insurance company which denies liability to an insured for a monthly disability claims for the reason that it contends that the insured was not totally and permanently disabled within the meaning of the policy, if mistaken, is liable to the assured for damages, for anticipatory breach of the contract. The great weight of American authority, both federal and state, holds that no such liability exists whatsoever, though the courts in denying recovery to the insured have not been at all times unanimous as to the grounds of denial. The courts have adopted, however, one or more of the reasons for non-liability stated in the dissenting opinion of Judge Denison in the case last cited above.

I. THE STATE LAW UPON THE SUBJECT.

We are well aware of the rule that in questions of important commercial law federal courts are not necessarily bound by state court decisions upon common law questions. This rule does not justify the conclusion, however, that state decisions should be thoroughly disregarded. Upon

the other hand, the policies were delivered and the premiums paid in Mississippi. The policies were Mississippi contracts. **New York Life Ins. Co. v. Dodge**, 38 S. Ct. 337, 246 U. S. 357, 62 L. ed. 772.

In the case of **Trainor vs. Aetna Casualty & Surety Co.**, 290 U. S. 47, 78 L. ed. 162, the Supreme Court of the United States used the following language, which is highly applicable to the present case:

> "It is enough to say that even where the principle applies, 'for the sake of harmony and to avoid confusion, the federal courts will lean towards an agreement of views with the state courts if the question seems to them balanced with doubt.' Burgess v. Seligman, 107 U. S. 20, 33, 34, 27 L. ed. 359, 365, 2 S. Ct. 10. And see Sim vs. Edenborn, 242 U. S. 131, 135, 61 L. ed. 199, 203, 37 S. Ct. 36, where the authorities are collected; Community Building Co. vs. Maryland Casualty Co. (C. C. A. 9th) 8 F. (2d) 678, 680."

The doctrine was re-examined and affirmed in **Mutual Life Ins. Co. v. Johnson**, decided by this court December 3, 1934.

The Supreme Court of Mississippi denies the right of recovery upon the part of an assured in such cases, basing its denial of right of recovery upon the broad ground that the policy provided only for the payment of disability claims monthly and the court should not write a new contract for the parties.

The Supreme Court of Mississippi in the case of **Metropolitan Ins. Co. v. Lambert**, 128 So. 750, 157 Miss. 759, held

that under a $2,000 life policy, providing for monthly payments for total disability, the insured, totally disabled, could recover only unpaid matured monthly installments. In that case the insured while employed by the Mississippi Central Railroad Company, suffered a fracture of the wrist, of a very serious character. The wound healed but he was unable to use his hand thereafter. The insurance company denied liability under the total and permanent disability clause of the policy, and alleged that the insured's disability was partial and not total. In bringing his suit the insured asked for not only the installments that were then due him by the insurance company, but also for all future installments under his policy. The jury returned a verdict for the insured without designating the amount of his recovery, and the court entered a judgment thereon for $2,000. The Supreme Court of Mississippi reversed this holding of the lower court, and used the following language:

> "The appellee's policy was for two thousand dollars, but payable, in the event of his becoming totally disabled, in forty monthly instalments of fifty-two dollars and fifty cents each.
>
> "The jury returned a verdict for the appellee, without designating the amount of his recovery, and the court entered a judgment thereon for two thousand dollars. This was error. The declaration alleges the failure of the appellant to pay any of the monthly installments accrued under the policy; and while it prays for a recovery in the sum of two thousand dollars, the only recovery to which appellee was entitled was for the unpaid

monthly installments of fifty-two dollars and fifty cents each; and a judgment should have been entered for the aggregate thereof, with accrued interest, only."

This case was decided prior to the Rascoe case. The rule was re-affirmed by the Supreme Court of Mississippi in the case of **Atlantic Life Ins. Co. v. Serio**, 154 So. 474, and the dissenting opinion of Judge Denison in the Rascoe case adopted as a correct statement of the rule in Mississippi, the court using the following language:

"There was no obligation on the appellant to make these monthly payments in advance, and the appellee could not sue therefor until the time for their payment passed without payment being made. The appellant's contention seems to be supported by Federal Life Ins. Co. v. Rascoe (C. C. A.) 12 F. (2d) 693, but we decline to follow it, and agree with the opinion of the dissenting judge therein."

2. FEDERAL DECISIONS.

This identical question was decided by the Circuit Court of Appeals, 8th Circuit, in the case of **Moore et al v. Security Trust & Life Ins. Co.**, 168 Fed. 496, in which case the plaintiffs were the holders of certain contracts, which, at a definite future date, would entitle them to commissions. The defendant insurance company was bound under its contracts to pay such commissions at the designated time. Prior to the time at which these commissions were to be paid, the defendant company entered into a reinsurance agreement with a rival company, whereby

such company was to take over the assets and obligations of the original insurance company. The plaintiffs contended that by so doing the defendant, insurance company, was making it impossible for it to perform its contracts at the date of performance, and that, therefore, this constituted an anticipatory breach of the contracts; which entitled the plaintiffs to bring an action for the commissions immediately, even though the time for the payment of the same had not arrived. The Circuit Court of Appeals, speaking through Judge Sanborn, thoroughly exhausted the authorities, and held that the anticipatory breach of a contract of this nature did not give the other parties to the contract the right to bring the action for damages prior to the date when the commissions were due, and used the following language:

> "There is another reason why the creation of this disability does not sustain an action for an anticipatory breach of this stipulation of the contract. It is that the rule that the creation of a disability to perform a contract or notice that one will not perform it before the time of performance arrives, warrants an immediate action for damages, applies only to actions on contracts that are mutually executory, such as contracts for marriage, for the rendition of services, or for the transportation or sale and delivery of property, where the covenants of the parties are interdependent and to be simultaneously performed. Illustrations of the contracts to which this rule applies are a contract of life insurance, where the undertakings of the parties are mutually executory and to be perform-

ed from time to time throughout the life of the party (Lowell v. St. Louis Life Ins. Co., supra); a contract for the future services of a courier to be subsequently paid for, where the employee notified the courier that he would employ him before the time for the rendition of the services arrived (Hochster v. De La Tour, 2, El & Bl. (Q. B.) 678, contracts for the delivery of articles purchased in specific portions at different times, to be paid for as delivered (Roehm v. Horst, 178 U. S. 1, 17, 18, 20, Sup. Ct. 780, 44 L. Ed. 853, Nichols v. Steel Company, 137 N. Y. 471, 487, 33 N. E. 561) a contract to Marry (Frost v. Knight, L. R. 7 Ex. 111) and a contract to manufacture articles to be paid for upon delivery (Danube & Black Sea Co. v. Xenos, C. B. (N. S.) 825).

"But this rule is inapplicable to, and it does not govern, actions upon bonds, notes, and upon other contracts to pay money at times specified, where the party of one part has completely executed the contract and it is executory only upon the part of the other party. No action for damages lies before the time of payment arrives against one who disables himself from paying, or gives notice that he will not pay his obligations under contracts of this kind. Roehm v. Horst, 178 U. S. 1, 17, 16, 20 Sup. Ct. 780, 44 L. Ed. 953; Nichols v. Steel Company, 137 N. Y. 471, 487, 33 N. E. 561; Washington County v. Williams, 111 Fed. 801, 810, 40 C. C. A. 621, 630. The claim to recover for the breach of the agreement to pay

the commission on the renewal premiums due after the termination of the agency contract is founded on an agreement of the latter class. The plaintiffs have performed their part of the contract of agency, they have completely earned the commissions, the contract is completely executed on their part, nothing remains executory but the agreement of the defendant to pay the commissions when the renewal premiums are collected, and those premiums had not become due or been collected, and the time had not arrived when the commissions were due when this action was brought. The defendant's creation of its disability to collect the premiums and to pay the commissions did not make the latter due earlier, and it created no cause of action for their present worth, and this action was prematurely brought."

The latest case upon the subject is **Kimel v. Missouri State Life Ins. Co.** (C. C. A. 10) 71 Fed. (2d) 921. In that case the defendant issued a combination life and disability policy. The policy provided for the payment of certain disability claims before the assured reached sixty years of age, but that after the assured reached sixty years of age, instead of obtaining disability payments, the assured was only entitled to the right to allow all premiums to accumulate without interest as an indebtedness. The assured became totally and permanently disabled before he reached sixty years of age but did not make proof thereof until after he reached sixty years of age. The company denied that it owed him anything for such disability claims, and took the position that the assured was liable for the payment

of premiums, that is to say, that the policy was subject to the payment of premiums without interest. The assured filed suit to recover (a) monthly disability claims, (b) anticipatory breach based upon his life expectancy, (c) premiums paid from 1925 to 1930. The District Judge disallowed the plaintiff's claim in its entirety. On appeal to the Circuit Court of Appeals of the Tenth Circuit, opinion by Judge Phillips, it was held (a) that the plaintiff was entitled to recover monthly disability payments accruing prior to the time he reached sixty; (b) assured entitled to recover premium payments; (c) the court held, however, that there was no anticipatory breach and that the assured could not recover total and permanent disability benefits based on the assured's life expectancy. The court used the following language:

> "To amount to an anticipatory breach of a contract, the renunciation by the promissor must be clear and unequivocal, and the refusal to perform must be of the whole contract or a covenant going to the whole consideration.
>
> "Here, as we shall presently undertake to show, Kimel demanded more from the insurance company than he was entitled to receive, and the insurance company offered less than it was obligated to render. Each in good faith insisted on his own interpretation of the contract.
>
> "An offer to perform in accordance with the promissors interpretation of the contract although erroneous, if made in good faith, is not such a clear and unequivocal refusal to perform as amounts to a renunciation giving rise to an anticipatory breach.

"As stated in Armstrong v. Ross, 61 W. Va. 38, 55 S. E. 895, 899:

" 'If this were not the law, it would be a dangerous thing to stand upon a controverted construction of a contract. Every man would act at his peril in such cases, and be subjected to the alternative of acquiescing in the interpretation adopted by his opponent, or putting to hazard his entire interests in the contract. The courts have never imposed terms so harsh, or burdens of such weight. It would amount to a virtual denial of the right to insist upon an honest, but erroneous interpretation.' "

The question was presented in the case of **Wyll v. Pacific Mutual Life Ins. Co.** of California (D.C.) Texas, 3 F. Supp. page 483. The identical question was involved and Judge Atwell decided that plaintiff was not entitled to recover for an anticipatory breach, using the following language:

"The plaintiff relies upon Federal Life Insurance Company v. Rascoe (C. C. A.) 12 F. (2d) 693. In that case Circuit Judge Donahue used the case of Roehm v. Horst, 178 U. S. 1, 20 S. Ct. 780, 44 L. Ed. 953, which is probably the outstanding treatment and announcement of the doctrine concerning the renunciation of a continuing agreement by one party and the result upon the obligation that theretofore rested upon the other party. Circuit Judge Denison, in his dissent, makes a strong showing by the use of the case as a support to his position.

"It is possible that in the Rascoe Case the observation of the court concerning the fact that the finding was a necessary result, since without separate findings of fact neither the evidence nor the question of law was reviewable, is the key to the difference. There a jury trial had been waived and the trial judge had made no findings.

"It is difficult for me to hold that the mere act of the defendant in questioning the plaintiff's right to claim payment of monthly installments as they accrue does thereby create a liability which is not contemplated in the contract of the parties. They agreed among themselves that if and when the plaintiff became disabled so as to 'lose his business time' that he should be paid $500 for every month in which he continued to remain in that condition. It may be true that the condition in which he is now will continue for the remainder of his life. It may be that that can be established by the testimony, but that is not the plaintiff's cause of action as alleged here, nor is it in the contract between the parties. Besides the Rascoe Case and, Roehm v. Horst, supra, there are Howard v. Benefit Association of Railway Employees, 239 Ky. 465, 39 S. W. (2d) 657, 81 A. L. R. 375; Kithcart v. Metropolitan Life Ins. Co. (D. C.) 1 F. Supp. 719; Parks v. Maryland Casualty Co. (D. C.) 59 F. (2d) 736, which interest. See, also, Washington County, Neb., v. Williams (C. C. A.) 111 F. 801; Moore v. Security Trust & Life Ins. Co. (C. C. A.) 168 F. 496; New York Life

Ins. Co. v. English, 96 Tex. 268, 72 S. W. 58; State Life Ins. Co. v. Atkins, (Tex. Civ. App.) 9 S. W. (2d) 290; Dunbar v. Dunbar, 190 U. S. 340, 23 S. Ct. 757, 47 L. Ed. 1084. In the last case we will, of course, see the difference between one who anticipates nonmarriage and one who claims a future disability, but the reasoning is entertaining upon that feature of the plaintiff's cause.

"I think that the demurrers and exceptions which are directed at that portion of the plaintiff's petition which seeks to recover for future months should be sustained. That leaves the cause for trial as to the period which has elapsed since the alleged accident."

The question was again presented in Kithcart v. Metropolitan Life Insurance Company, (D. C. Mo.) 1 F. Supp. 719, where the following language is used:

"Without discussing the technical allegations, of the petitions, or the language of the motions filed by the several defendants, it is sufficient to say that these motions raise the specific question in each case as to the liability of an insurance company for present recovery of future installments when liability has been denied.

"Plaintiffs rely especially on Federal Life Insurance Company v. Rascoe (C. C. A.) 12 F. (2d) 693, 695. This opinion was delivered by the Court of Appeals of the Sixth Circuit. The majority opinion upheld the right to recover upon the whole contract independently of its provisions for future installments.

"However, it was pointed out by the court that there was no separate finding of facts in the case, which was tried to the court without the intervention of a jury. The court said: 'Without such separate findings of facts, neither the evidence nor the question of law presented by it is reviewable by this court.'

"It was then said by the court that the plaintiff 'does not rely upon an anticipatory breach, ... but upon an actual breach, ... coupled with an actual repudiation of the entire contract.'

"In order to bring the case within the doctrine of Roehm v. Horst, 178 U. S. 1, 20 S. Ct. 780, 786, 44 L. Ed. 958, the court said: 'This contract, therefore, is not an unconditional promise to pay a sum certain in installment, or in gross; where plaintiff has fully performed. On the contrary, she is required every thirty days to submit her person to the examination of a physician and pay the physician for making such examination and for preparing a report in writing to be forwarded to the company.'

"The following statement was made because of the almost universal doctrine that, in the absence of mutual obligations, recovery cannot be had for future installments, as in the case of Bonds and Notes. In other words, in the absence of mutual obligations, future installments cannot be matured on the grounds of a breach of con-

tract. The rule was well stated in the Horst case supra, as follows: 'We decide simply this case where there are material provisions and obligations interdependent.'

"The following principle was announced in the Horst case, supra, which appears applicable here: 'We think it obvious that both as to renunciation after commencement of performance and renunciation before the time for the performance has arrived, money contracts, pure and simple, stand on a different footing from an executory contract for the purchase and sale of goods."

"The instant cases are 'money contracts, pure and simple.' Each of the defendants promised to pay money installments upon certain contingencies. It is claimed by the plaintiffs that the certain contingencies have occurred. The obligations of the defendants are to continue the payment of certain installments so long as such contingencies exist.

"It is true that the defendants required proof of the continuing existence of the conditions upon which their obligations rested. There was no contractual duty upon the plaintiffs. Their contractual obligations were to pay premiums, and then, upon the happenings insured against, liability accrued against the defendants. This court cannot accept as law the statement of the majority opinion in the Rascoe case, supra, that the mere examination of a physician every thirty

days imposed upon the insured an executory contractual obligation, although such question is not in this case.

"The plaintiffs are not required to sue for installments not yet matured. All they need to do is to sue for matured installments, and, if successful, the judgment would not be a bar to further suits on installments hereafter maturing."

The same conclusion was reached by District Judges in the following cases: **Hines v. Fidelity Mutual Life Ins. Co.** (D. C. N. Y.) 6 Fed. Supp. 692; **Menssen v. Travellers Ins. Co.** (D. C. N. Y.) 5 Fed. Supp. 114; **Ginsburg v. Pacific Mutual Life Ins. Co.** (D. C. N. Y.) 5 Fed. Supp. 296; **Lavecchia v. Connecticut Mutual Life Ins. Co.** (D. C. N. Y.) 1 Fed. Supp. 588.

The question was again presented in **Parks v. Maryland Casualty Company** (D. C. Mo.) 59 Fed. (2d) 737, opinion by Judge Otis, wherein the following language is used:

"The theory that an insured in a policy of accident insurance may presently sue for the recovery of what by the terms of the insurance contract might be coming to him in the future if there is a repudiation of the entire contract by the insured has quite often been presented as in the petition here, since a decision by the Court of Appeals for the Sixth Circuit in Federal Life Ins. Co. v. Rascoe, 12 F. (2d) 693, 697. The decision in that case was chiefly based on the opinion of the Supreme Court of the United States in Roehm

v. Horst, 178 U. S. 1, 20 Sup. Ct. 780, 785, 44 L. Ed. 953. The Rascoe case represents the extreme development of the theory. It was decided by a divided court, a very convincing dissenting opinion by Circuit Judge Denison holding that the majority had in its application of the law to the facts extended the doctrine of Roehm v. Horst beyond the limits of that doctrine as it was declared by the supreme court.

"The petition here, in the part thereof now under consideration, is not good even under the majority opinion in Federal Life Ins. Co. v. Rascoe. That opinion holds that before a suit for damages for future payments may be maintained the contract must be executory on both sides. But it was ruled that the particular contract there considered was executory on both sides since there remained for the insured certain things to be done before he was entitled to continue payments for total disability. The difference between the dissenting opinion and the majority opinion chiefly is the view of Judge Denison that the contract was not executory on the part of the insured, that the things which were yet required of him were conditions precedent to the receipt of future payments and not obligations imposed upon him by the contract.

"The Rascoe case does not support the petition here, because the plaintiff here alleges he has performed all obligations required of him by the

contract. Nothing remains for him to do; so far as he is concerned, if the allegations of the petition are to be taken at their face value, the contract has been executed."

The appellant in the present case alleges full and complete compliance on his part with every condition precedent to liability on the part of the appellee. (R. 2.)

In the instant case, **Mobley v. New York Life Insurance Co.**, C. C. A. 5, 74 Fed. (2) 588, the court, speaking through Judge Sibley, used the following language:

"Ordinarily, breach of a contract cannot occur until performance is due. In case the promisor prevents performance or disables himself to perform, a right of action at once accrues. In some classes of contracts, while executory on both sides, notably those for personal services and for the purchase or manufacture of goods, or for marriage, a total repudiation of the contract by one party before the time for performance may at the option of the other be treated as a present breach, excusing him from performance on his part and enabling him to sue the repudiator at once for all resulting damages; or he may decline to treat it as a breach and elect to keep the contract in force, tendering performance on his part at the time fixed by the contract and demanding performance of the repudiator. Hochester v. De La Tour, 2 El. & Bl. 678; Pierce v. Tennessee Coal, I. & R. Co., 173 U. S. 1, 19 S. Ct. 335, 43 L. Ed. 591; Roehm v. Horst, 178 U. S. 1, 20 S. Ct. 780, 44 L. Ed. 953.

This doctrine of an anticipatory breach does not apply to commercial paper or in general to simple promises to pay money due on an executed consideration. It is said in Kelly v. Security Mutual Life Ins. Co., 186 N. Y. 16, 78 N. E. 584, 9 Ann. Cas. 661, approved in Killian v. Metropolitan Life Ins. Co., 251 N. Y. 44, 166 N. E. 798, 64 A. L. R. 956, to be confined to contracts to marry, for service, and for goods to be manufactured or delivered, and to have no application to insurance policies. But in Lovell v. St. Louis Life Ins. Co., 111 U. S. 264, 4 S. Ct. 390, 28 L. Ed. 423, the doctrine was applied to a repudiation by the insurer of an unmatured life insurance contract, but the recovery was measured not by the present worth of the face of the policy but by the amount of premiums paid less the value of the insurance already enjoyed, now generally called the reserve value of the policy. In Federal Life Ins. Co. v. Rascoe, (C. C. A.) 12 F. (2d) 693, the doctrine was applied by a divided court to render collectible at once both past and future disability payments as here contended for, and Mobley relies strongly on that case. It has been more conspicuously distinguished and disapproved than followed. In federal courts see Kithcart v. Metropolitan Life Ins. Co. (D. C.) 1 F. Supp. 719; Wyll v. Pacific Mutual Life Ins. Co. (D. C.) 3 F. Supp. 483; Menssen v. Travelers' Ins. Co. (D. C.) 5 F. Supp. 114; Ginsburg v. Pacific Mutual Life Ins. Co. (D. C.) 5 Fed. Supp. 296; Hines v. Fed. Mutual Life Ins. Co.

(D. C.) 6 Supp. 692. It seems opposed in principle to the decision in the Eighth Circuit in Moore v. Security Trust & Life Ins. Co. (C. C. A.) 168 F. 496, where in effect it is held that while an executory contract of life insurance is capable of anticipatory breach, no contract to pay money is capable of it after it has become executed on the part of the promissee."

The court also used the following language:

"On a war risk insurance contract for example, it has never been supposed that the insured by winning a contest touching his rights, even when they were totally denied, could recover the present value of future installments contrary to the very terms of the insurance. Compare United States v. Worley, Adm'x, 281 U. S. 339, 50 S. Ct. 291, 74 L. Ed. 887. Anticipatory breach cannot with this effect be asserted in the present case."

The most recent decision on the subject is that of **Kanelidis v. Great Northern Life Ins. Co.**, D. C. Minn., decided March 27th, 1925, where the court used the following language:

"To found the basis of an anticipatory breach, the repudiation or refusal to perform the contract must be a positive one, so as to leave no doubt as to the parties final determination in this respect.

"Fed. Law. (Contracts) Book 2, page 221, Sec. 447, and authorities there cited.

"The finding that there was no renunciation of the contract is sufficient to defeat this action.

"However, there is a further reason why the plaintiff cannot predicate his action upon an anticipatory breach.

"It is well settled that where a contract is executory upon both sides and is repudiated by one party, the other may presently have his damages assessed as for an anticipatory breach. But the rule excepts cases where the contract on the plaintiff's part is not executory.

"Roehm v. Horst, 178 U. S. 1; 20 S. Ct. 780; 44 L. Ed. 953; Menssen v. Travelers' Ins. Co., 5 Fed. (2) 114; Wyll v. Pacific Mutual Life Ins. Co. of Calif., 3 Fed. Sup. 483; Kithcart v. Metropolitan Life Ins. Co. and Kevan v. John Hancock Mut. Life Ins. Co., 1 Fed. Sup. 719; Parks v. Maryland Cas. Co., 59 Fed. (2) 736.

"In the case of Roehm v. Horst, supra, Judge Fuller said:

" 'We think it obvious that both as to renunciation after commencement or performance and renunciation before the time for performance has arrived, money contracts, pure and simple, stand on a different footing from executory contracts for the purchase and sale of goods.'

"The present case involves a contract for the payment of money, pure and simple.

"Plaintiff relies upon the case of Federal Life Ins. Co. v. Roscoe, 12 Fed. (2) 693. That case does

not dispute the rule as stated above, but the Court there held that the contract was executory. Judge Donahue, writing the opinion, said:

"'While the plaintiff in this case has fully discharged her obligation to pay the premiums coming due prior to her injuries, and has continued to pay the premiums until the insurance company declined to accept further payments, nevertheless it is averred in the bill of complaint that by the express terms of this contract she is still required to furnish, and has furnished, regularly to the insurance company, every 30 days, or as near thereto as may be reasonably possible, a report in writing from her attending physician or surgeon, fully stating the condition of the assured and the probable duration of her disability.'

"And so holding that there were mutual, unperformed obligations on both sides and that the contract was a bilateral contract, recovery was permitted on the basis of an anticipatory breach.

"That decision was by a divided court. Judge Denison, dissenting, holds that the contract was unilateral and that the plaintiff had not stated a cause of action, and his opinion has been approved by all of the cases that have been decided since which have been called to my attention.

"The stipulations in the present case as to furnishing evidence of the continuing existence of the conditions, are not the same as those referred

to by Judge Donahue in the Rascoe case, but if they were I cannot agree with the statement that the contract was still bilateral by reason of the fact that proof was required of the continuing existence of disability. The contract in the present case does stipulate that the insurance company may send its physician to examine plaintiff from time to time to see if the disability still continues, but that imposes no contractual duty upon the plaintiff. All of the plaintiff's obligations had been performed. The plaintiff's contractual obligation was to pay the premiums until total and permanent disability occurred. If he did that and disability occurred there was nothing remaining for him to do."

3. DECISIONS FROM OTHER STATES:

The decision of the Circuit Court of Appeals, Fifth Circuit, in the instant case is in accord with the great weight of authority from state courts.

ARKANSAS:

In the case of **Mutual Life Insurance Company of New York v. Marsh,** (Ark.), 56 S. W. (2) 433, in which it appeared the plaintiff was issued a disability policy by the defendant company in 1922, and had become disabled four years later in 1926. The company paid him regularly until 1930, when it declined to make further payments upon ascertaining that the insured had been elected circuit clerk of Nevada County. The insured claimed that this was a repudiation of the contract, and sued for all future installments under

his policy. The Supreme Court of Arkansas refused to allow plaintiff to recover, holding that the facts and circumstances did not, in any wise, show an unqualified renunciation of the contract on the part of the insurance company, and said:

> "The court instructed the jury on the question of damages to the effect that if they found the appellee totally and permanently disabled within the meaning of the policy, they might return a verdict for a sum equal to the present value of the monthly benefit payable monthly during the period of appellee's life expectance. The appellant contends that this was error, and in this contention we agree. . . . . In the instant case there was not a refusal to carry out the contract and a renunciation of the agreement, but in the course of the correspondence between the parties when default was first made in the payment, there was simply the contention that under the existing facts, the insured for the time being was no longer entitled to the monthly benefits. Recognizing that there had been no repudiation of the contract, appellee paid the premium January 25, 1932, and testified that the policy was still in effect, and in his complaint, alleged that the contract had been put in force in January, 1922, and had remained in full force and effect at the time of the filing of the suit. The appellant in its answer expressly disavowed any repudiation, but affirmed the contract and merely contended that under its terms the appellee was not entitled to the monthly benefits."

Opposing counsel cite the case of **Aetna Life Insurance Co. v. Phyfer, 160 Ark. 98, 254 S. W. 335.** That case was distinguished in the case of **Mutual Life Insurance Co. v. Marsh,** the Court using the following language:

> "This makes this case unlike that of Aetna Life Ins. Co. v. Phyfer, 160 Ark. 98, 254 S. W. 335, 337, relied upon by appellee. In that case the plaintiff was allowed to recover the present value of the future benefit installments because the court found that there had been a total repudiation of the contract, in that the insured, by letter, had in express words denied liability on the claim that the policy had lapsed. The court said: 'This letter evinced an intention on the part of appellant not to be bound by the terms of the contract, and was equivalent to a renunciation thereof.' That case followed the rule in Roehm v. Horst, supra."

The rule announced in the Marsh case was re-affirmed by the Supreme Court of Arkansas in the case of **Massachusetts Protective Association v. Jurney, 68 S. W. (2) 455.**

And the doctrine was again announced in the case of **Jefferson Standard Life Insurance Co. v. Slaughter, 79 S. W. (2) 58.**

CALIFORNIA:

In the case of **Brix v. People's Mutual Life Ins. Co., 37 Pac. (2) 448,** and the case of **Cobb v. Pacific Mutual Life Ins. Co., 40 Pac. (2) 574,** recovery was denied, and the cases of **Metropolitan Life Ins. Co. v. Lambert, 157**

Miss. 759, 128 So. 750, and Howard v. Benefit Ass'n, 239 Ky. 465, 39 S. W. (2) 657, 81 A. L. R. 375, cited with approval.

KENTUCKY:

In the case of Howard v. Benefit Association, 239 Ky. 465, 39 S. W. (2) 57, 81 A. L. R. 375, where the same question was involved, the Court declined to follow the Rascoe case, and approved the dissenting opinion of Judge Denison, using the following language:

> "As pointed out in the dissenting opinion of Judge Denison, the case of Roehm v. Horst, 178 U. S. 1, 20 S. Ct. 780, 44 L. Ed. 953, cited in the majority opinion, declared that, where a contract is executory on both sides and is repudiated by one party, the other may presently have his damages assessed as for an anticipatory breach, but it excepts from that rule cases where the contract on the plaintiff's part is not executory."

The question was again examined in Woods v. Provident Life & Accident Insurance Co., (Ky.), 42 S. W. (2) 499, and the case of Howard v. Benefit Ass'n cited with approval. The Court used the following language:

> "The policy provides when and how the monthly accident indemnity shall be paid, and appellant will be confined to the provisions of the policy in that respect."

The question was re-examined and the rule re-announced in the case of Prudential Ins. Co. v. Cox, (Ky.), 71 S. W. (2) 31. And the Court again declined to follow the majority opinion in the Rascoe case, and expressed its

concurrence in the rule announced in Judge Denison's dissenting opinion.

MINNESOTA:

In the case of **Garbush v. Order of United Commercial Travelers of America,** 228 N. W. 148, the Supreme Court of Minnesota expressly refused to follow the decision of the majority of the court in **Federal Life Ins. Co. v. Rascoe,** supra, but chose to follow the well-reasoned dissenting opinion of Judge Denison. The Court, speaking through Mr. Justice Hilton, said:

> "Defendant cited Federal Life Insurance Co. v. Rascoe, (C. C. A.) 12 Fed. (2) 693, in support of its contention that suit covering the $1,300.00 could have been brought at once after disallownce of claim. The majority opinion in that case supports defendant's position. We, however, do not agree. Our view is in accord with a strong dissenting opinion of Judge Denison, in so far as the same is applicable to the present case. Here, there is an executory contract where there is nothing for plaintiff to perform."

The question was again examined by the Supreme Court of Minnesota in the case of **Reismuller v. Prudential Ins. Co.,** 256 N. W. 187, liability was denied, the majority in the Rascoe case disapproved, and the dissenting opinion of Judge Denison again referred to with approval.

MISSOURI:

In **Puckett v. National Annuity Ass'n,** 114 S. W. 1039, (134 Mo. App. 501), the policy provided for the payment of $75.00 every three months for ten years upon

the loss of one eye. The plaintiff lost an eye, and defendant paid one installment and then, because of some misunderstanding, ceased further payments. At the trial of the case it offered the payment on judgment for the accrued installments, but the trial court entered judgment for a lump sum for all the installments to become due over a period of ten years. This judgment was reversed, the court holding that the theory was only applicable in certain special cases, that the plaintiff would not be barred by the bringing of one action, and that it was, therefore, unfair to the defendant to permit such recovery. The court used the following language:

> "Stipulations in the contract in suit were that any liability under it should be paid in the form of annuities in quarterly installments, and that the means of defraying these payments should be the dues and assessments collected monthly from members. These provisions would be disregarded, and respondents accorded a greater right than their agreements accorded them, if appellant was forced to pay the whole amount of the annuity at once, and, perchance, out of assets not raised from monthly dues and assessments."

The Circuit Court of Appeals of Missouri affirmed its holding in the foregoing case in the recent cases of **Allen v. National Life & Accident Ins. Co.**, 67 S. W. (2) 534; **Chipley v. National Life & Accident Ins. Co.**, 67 S. W. (2) 992; **Buis v. Prudential Ins. Co. of America**, 77 S. W. (2) 127.

NEW YORK:

In the case of Kelly v. Security Mutual Life Ins. Co., (Court of Appeals of New York), 78 N. E. 684, the court refused to establish the rule that the anticipatory breach of an insurance contract rendered the insurance company personally liable for damages to the insured, although the date of payment was not then due, and said:

> "An attempt to repudiate such a contract does not make it due. If the maker of a promissory note, given for borrowed money and due one year after date, notifies the holder the next day that he repudiates it and will not pay it, can the holder sue at once? Can a mortgagor make his mortgage due before the law by repudiating it in advance? The rule that renunciation of a continuous executory contract by one party before the day of performance gives the other party the right to sue at once for damages, is usually applied only to contracts of special character, even in the jurisdiction where it obtains at all. It is not generally applied to contracts for the payment of money at a future time, and in some states the principle is not recognized in any way whatsoever. Daniels v. Newton, 114 Mass. 530, 19 Am. Rep. 384; Stanford v. McDill, 6 N. D. 536, 72 N. W. 938, 38 L. R. A. 760; Carstens v. McDonald, 38 Neb. 838, 57 N. W. 757; King v. Waterman, 55 Neb. 324, 75 N. W. 830. In other states and in the federal courts, the principle is adopted but applied with caution. Roehm v. Horst, 178 U. S. 1, 17, 18, 20 S. Ct. 780, 44 L. Ed. 953; Schmidt v. Schnell,

70, Dec. 657; Brown v. Odill, 104 Tenn. 250, 56 S. W. 840, 52 L. R. A. 660; Reedling's Sons v. Fence Co., 130 Ill. 660, 22 N. E. 518; Unexcelled Fire Works Co. v. Polites, 130 Pa. 536, 18 Atl. 1058, 17 Am. St. Rep. 788. In this state, it seems to be limited to contracts to marry, (Burtis v. Thompson, 42 N. Y. 236, 1 Am. Rep. 516); for personal services, (Howard v. Daly, 61 N. Y. 362, 19 Am. Rep. 285), and for the manufacture or sale of goods, (Windmuller v. Pope, 107 N. Y. 674, 14 N. E. 436; Nichols v. Scranton Steel Co., 137 N. Y. 471, 33 N. E. 561). At least, we have not extended it to mutual life insurance policies, perhaps for the reason that the question of fact opened to unscrupulous persons by such extension might undermine the solvency of the company and inflict gross injustice upon the other policyholders."

In Donlen v. Fidelity & Casualty Co., 192 N. Y. Sup. 513, the insured was disabled by insanity. Suit was brought for the commuted value of all installments based upon the life expectancy of the insured. The court held that the policy itself provided when, and how, and under what circumstances payments would be made, the provisions in this case were that they should be made weekly; that it was evidently the intention of the parties to pay only at the stated time, and plaintiff could recover nothing in addition thereto. The court suggested, furthermore, that there was no such refusal or denial of liability as would in any event furnish grounds for damages. The court used the following language:

"The proof shows that she is suffering from an incurable malady, and, based upon the assumption that the incompetent would never fully recover, this action was brought to recover an amount to be based upon the expectance of life of the incompetent as shown by the Northampton Tables, the defendant having first disclaimed all liability under the policy. Plaintiff cannot, however, succeed on this branch of the case. The policy states definitely when and under what circumstances the defendant is required to pay, and and its refusal to pay the full amount of the weekly indemnity specified in the policy, based upon its belief that the plaintiff is not entitled to the maximum of such weekly benefits, is not such a refusal to pay or such a denial of its liability as would in any event furnish grounds for an action to recover the full amount of the loss at this time. But, aside from that reason, the policy states definitely when and under what circumstances the weekly indemnity is to be paid, and the plaintiff cannot recover in this action the full amount of plaintiff's damage based upon her expectance of life. It was the intention of the parties, as evidenced by the policy, to pay only at the time and in the manner specified in the policy."

The case of **Kelly v. Security Mutual Life Ins. Co.**, 78 N. E. 634, 186, N. Y. 16, was qouted with the approval in the case of **Killian v. Met. Life Ins. Co.**, 251 N. Y. 44. In that case, the court needed to define the word "contest" under a provision of the policy that the policy was incontest-

able after two years. The defendant company had denied liability within two years, but had taken no steps in regard to contesting the same, and no suit had been brought thereon. In the opinion, written by Judge Cardozo, the Court said:

> "Repudiation of a policy is notice that a contest will ensue if insured or beneficiary shall make attempt thereafter to enforce a claim of right. It is not a contest of itself. Repudiation before maturity (the subject of the contract being a policy of insurance) is not even such a breach as will sustain a remedy at law for the recovery of damages, (Kelly v. Security Mutual Life Ins. Co., 186 N. Y. 16), though it may be the occasion for a declaratory judgment or other remedy in equity."

In the case of **Charles I. Gilbert, Respondent, v. New York Life Insurance Company, Appellant,** 238 N. Y. App. Div. 544, it was said:

> "The cases in this State hold that where an insurance company repudiates its obligations, there cannot, in any event, be any recovery of the premiums paid. (Skudera v. Metropolitan Life Insurance Co., 17 Misc. 367; Keyser v. Mutual Reserve Fund Life Association, 60 App. Div. 297; Speer v. Phoenix Mutual Life Insurance Co., 36 Hun, 322). Each of the authorities above cited clearly holds that in the event of the wrongful forfeiture and repudiation by the insurance company, the insured may not, in any event, recover back premiums that he had paid. While those cases also hold that a recovery may be had by way

of damages for the breach, the Court of Appeals, in Kelly v. Security Mutual Life Insurance Co. (186 N. Y. 16), overruled said decisions in that respect, the Court of Appeals holding that the doctrine of allowing damages for an anticipatory breach should not be extended to mutual life insurance company cases. The decision in Kelly v. Security Mutual Life Insurance Co. (supra) was recently cited with approval by Chief Judge Cardozo in the case of Killian v. Metropolitan Life Insurance Co. (251 N.Y.44). At the bottom of page 48, Judge Cardozo had this to say, with reference to a contract for life insurance: 'Repudiation before maturity (the subject of the contract being a policy of insurance) is not even such a breach as will sustain a remedy at law for the recovery of damages (Kelly v. Security Mut. Life Ins. Co., 186 N. Y. 16), though it may be the occasion for a declaratory judgment or other remedy in equity.'"

NORTH CAROLINA:

In the case of Green v. Inter-Ocean Casualty Co. of Cincinnati, Ohio, 167 S. E. 38, recovery was denied, and the prevailing rule adopted.

OKLAHOMA:

The rule announced in the Circuit Court of Appeals, Fifth Circuit, in the instant case is the prevailing rule in the State of Oklahoma. Mid-Continent Life Ins. Co. v. Walker, (Okla.) 260 Pac. 1109; Mid Continent Life Ins. Co. v. Christian, (Okla.) 36 Pac. (2) 72.

TENNESSEE:

In the instant case, the Circuit Court of Appeals, Fifth Circuit, cited, as supporting the prevailing rule, the case of **Atkinson v. Railroad Employees' Mutual Relief Society**, 22 S. W. (2) 631.

TEXAS:

The following Texas cases directly support the rule announced in the instant case: **New York Ins. Co. v. English**, 72 S. W. 58; **State Life Ins. Co. v. Atkins**, 9 S. W. (2) 290; **Huey v. American National Ins. Co.**, 45 S. W. (2) 340; **American Bankers Ins. Co. v. Moore**, 73 S. W. (2) 620.

The American Law Institute, Restatement of the Law of Contracts, paragraph 318, announces the following rule:

> "318. Anticipatory Repudiation as a Total Breach. Except in the cases of a contract originally unilateral, and not conditional on some future performance by the promisee, and of a contract originally bilateral that has become unilateral and similarly unconditional by full performance by one party, any of the following facts, done without justification by a promisor in a contract before he has committed a breach under the rules stated in Section 314-315, constitutes an anticipatory repudiation which is a total breach of contract: (a) A positive statement to the promisee or other person having a right under the contract, indicating that the promisor will not or cannot substantially perform his contractual duties."

The same rule is announced in Williston on Contracts, Vol. III, Sec. 1329, page 2382; Page on Contracts, Vol. V, Sec. 2891, page 5107.

4. APPELLANT'S CASES DISTINGUISHED:

We have heretofore distinguished the case of **Federal Life Ins. Co. v. Rascoe,** (C. C. A. 6), 12 Fed. (2) 693, and the Court will have observed the unfavorable criticism in respect to the case.

We have also heretofore referred to the case of **Roehm v. Horst,** 178 U. S. 1, 44 L. Ed. 953, cited by the appellant. As heretofore pointed out, this not only does not support the appellant's contention, but is adverse thereto.

The remaining cases cited by appellant are not at all in point, as will hereinafter appear.

1. In **Pakas v. Hollingshead,** 184 N. Y. 211, 77 N. E. 40, the entire case is stated in the syllabus, which is in the following language:

> "Where goods are sold to be delivered and paid for in installments, and the vendor refuses to deliver an installment, it is a breach of the entire contract, for which the vendee may immediately recover his damages or he may wait until the time for the delivery of the goods has expired and then recover, but he can not maintain successive actions to recover for a breach of delivery of each installment so that a judgment for damages for nondelivery of a part of the goods is a bar to an action for failure to deliver the balance."

2. In the case of **Colorado Yule Marble Co. v. Collins,** 230 Fed. 78, the appellant employed the appellee to do certain construction work for it. After the appellee had proceeded with the performance of the contract, the appellant

requested that the work be stopped, and refused to permit the appellee to proceed therewith. The appellee sued for accrued estimates on the work, as well as the profits which he would have made. The Circuit Court of Appeals justified the recovery, using the following language:

> "As bearing upon the first three of these points, it should be borne in mind that this was a partially executed contract, and a number of the authorities agree that there is a difference between contracts wholly executory and those executed in whole or in part. But in Roehm v. Horst, 178 U. S. 1, 20 S. Ct. 780, 44 L. Ed. 953, the Supreme Court, after a most exhaustive consideration of both English and American authorities, held substantially that there was no difference between purely executory and partly executed contracts, and that where one party to a contract clearly and positively renounced his contract before any part of it was executed, a cause of action for the loss of profit accrued at once to the other party. That opinion is quite conclusive, so far as it goes, up this court, as it was upon the District Court."

3. In **Aetna Life Ins. Co. v. Gehr**, (C. C. A. 9), 50 Fed. (2) 657, the agent of the appellant Insurance Company delivered a policy to the assured which provided that it should not become effective except and unless the first premium was paid. The Insurance Company contended that the policy was delivered to the assured merely for inspection. Concurrently therewith, however, the assured met death entitling the beneficiary to the benefit of the double

indemnity of the policy, provided the policy was in force. The company denied all liability under the policy, claiming the benefit of the provision therein contained to the effect that the policy was not to become effective except and unless the first annual premium was paid in cash. Under the Civil Code of California, however, (see page 658) the delivery of the policy made the same effective. The Court held that recovery might be had upon the policy without making proof of death and without waiting to the end of what is known as the endowment term. In other words, that the beneficiary was entitled to sue immediately. In that case, however, it will be noted that there are the following differences:

(a) The California statute invalidated the clause in the policy that the policy should not become effective.

(b) The defendant Insurance Company fully and completely repudiated, in the most absolute terms, the obligation.

(c) It will be further noted that the assured was dead, and the beneficiary was permitted to recover the benefits under the policy without waiting until the maturity thereof; that is to say, the expiration of the term time period.

4. In the case of Carnig v. Carr, 167 Mass. 544, 35 L. R. A. 512, there was involved merely the question of the mutuality of the contract of employment and the application of the statute of frauds.

5. In the case of Hinckley v. Pittsburgh Bessemer Steel Co., 121 U. S. 264, 30 L. Ed. 967, the syllabus correctly states the case, which is in the following language:

"1. In an action to recover damages for the breach of a written contract for the purchase by the defendant of 6,000 tons of steel rails, on the special findings of the court below, it is held: That the failure of the defendant on due notice to furnish drilling directions, together with his request to postpone the delivery of the rails, and, also, with a notice that he was not ready to accept and pay for them, excused the plaintiff from actually manufacturing and tendering them; and that the measure of damages is the profit the plaintiff would have made less the profit realized on rails made from the material purchased by the plaintiff with which to perform the contract. 2. This court will not reverse a judgment for alleged errors in the admission of evidence, which could not have prejudiced the plaintiff in error."

6. In the case of **Indiana Life Endowment Co. v. Reed,** (Appellate Court of Indiana), 103 N. E. 77, the opinion of the court contained the following language:

"With few exceptions, the courts of England and America have held that the renunciation of an executory contract, either before or after the time of performance, has arrived, or the refusal to carry out the provisions of a contract in course of performance, gives a right of action to the injured party for the damages sustained by reason of such breach or repudiation of the contract. A denial of all liability, where liability has attached, is held to give the injured party the right to treat the contracts as broken or repudiated and to pur-

sue his remedy for damages for the breach, and to recover, once for all, in a single suit all that may ultimately be due him."

7. The case of **Lovell v. St. Louis Mutual Life Ins. Co.**, 111 U. S. 264, 28 L. Ed. 423, bears no relation whatever to the instant case. There the company agreed with the assured that after three full annual premiums were paid, if default should be made in the payment of a premium, a paid up policy would be issued to him for the amount of insurance which the premium would purchase. After paying three full premiums, the assured surrendered the policy to the company, with the request that such a policy be issued to him. The company took the policy and kept it. In the meantime, it sold out to an entirely different company, which returned the policy to the assured, with the endorsement that the policy was in force for a stipulated amount, provided interest on the assured's notes was paid. The Court held that this was a breach of the contract, and that the plaintiff might recover of and from the reinsuring company whatever he was entitled to under said contract with the original company. The assured was never at any time at fault in the performance of his obligation.

8. In the case of **Nicholas v. Scranton Steel Co.**, 137 N. Y. 487, 33 N. E. 566, the court held that in a contract for the sale of certain commodities, the defendant had entirely repudiated the contract, and the plaintiff, not being at fault, the contract still being executory on each side, might sue for damages sustained.

9. In the case of **Pearce v. Tenn. R. R. Co.**, 173 U. S. 1, 43 L. Ed. 591, the plaintiff—appellant—was injured

while in the employ of the appellee railroad company; and, in settlement of his claim for injuries, the railroad company agreed to employ him for the remainder of his life at a stipulated wage. The agreement was carried out by the railroad company for several years. Thereafter, it completely repudiated all liability to the plaintiff, and the plaintiff brought suit against the company for all damages sustained, or to be sustained, treating the contract as terminated. The contract was executory upon both sides, and being so executory, the railroad company having repudiated the entire contract, this court held that the plaintiff should be permitted to recover.

10. In the case of **Vicksburg & M. R. R. Co. v. Putnam**, 118 U. S. 545, 30 L. Ed. 257, plaintiff was permanently injured by the negligence of the defendant railroad company. The court held that the plaintiff was entitled to recover for the loss of earning capacity, using the following language:

> "In an action for personal injury, the plaintiff is entitled to recover compensation, so far as it is susceptible for an estimate in money, for the loss and damage caused to him by the defendant's negligence, including not only expenses incurred for medical attendance, and a reasonable sum for his pain and suffering, but also a fair recompense for the loss of what he would otherwise have earned in his trade or profession, and has been deprived of the capacity of earning by the wrongful act of the defendant. Wade v. Leroy, 20 How. 34, 15 L. Ed. 813; Nebraska City v. Campbell, 2 Black, 590, 17 L. Ed. 271; Ballou v. Farnum, 11 Allen 73; New Jersey Exp. Co. v. Nicholas, 3 Vroom,

166, and 4 Vroom, 434; Phillips v. London & Southwestern R. Co., 4 Q. B. D. 406. 5 Q. B. D. 78, and 5 C. P. D. 280; S. C. 49, L. J. Q. B. 233."

The case was reversed upon other grounds.

11. Prudential Insurance Co. of America v. Faulkner, (C. C. A. 10), 68 Fed. (2) 676, was a case where, under a disability policy, defendant had at its option either one of two methods of paying,—paying by the month or paying in a lump sum. When it repudiated the contract, and refused to pay according to either method, and its liability being settled, the court held that it had waived its right to elect its method of settlement.

The case of Bu-Vi-Bar Petroleum Corp. v. Krow et al., 40 Fed. (2) 488, was a total and unconditional repudiation and abandonment of the entire contract calling for the performing of personal services.

The case of Reed Brothers v. Bluff City Motor Co., 139 Miss. 441, 104 So. 161, falls within the same distinction.

In the case of Mutual Reserve Fund Life Ass'n. v. Ferrenbach, (C. C. A. 8), 144 Fed. 342, the policy issued was one where premiums were assessed covering the current death losses of the company with added sum for expense. The company wrongfully undertook to rescind the contract for the alleged nonpayment of premium. The insured could obtain no other insurance. He was an invalid and died before the suit was tried. The court used the following language:

> "At any rate, death has solved all uncertainty. The policy was for $5000.00 and was payable at death."

The court held that the case had very special features withdrawing it from the usual rule, using the following language:

"The peculiar features of this case withdraw it from the operation of the rules which most frequently find application. In a policy issued upon what is termed the level premium plan, the insured has an equity arising from an excess of premiums paid above the current cost of insurance to the company. Under such a plan, the natural premiums for the respective years, which steadily and progressively increase as the insured advances in age, are so adjusted and averaged among the years of his expectancy of life that they become flat or level, the same in amount in the beginning as at the end. In such a case, it is apparent that the earlier level premiums contain an appreciable excess over the actual cost of insurance, which decreases, however, with the progress of the years. So it is said that in a level premium policy the insured has an equity, the excess of payment above the cost of insurance, which constitutes an element of damage resulting from wrongful cancellation. Such was the policy in the case of Lovell v. Insurance Co., 111 U. S. 264, 4 Supt. Ct. 390, 28 L. Ed. 423. But the Lambert policy is of an entirely different character. It was issued upon the assessment plan, and each year's premiums represented the actual current cost to the association of carrying the insurance risk. There was no excess over

cost out of which an equity or value could arise. Insurance Co. v. Roth, 59 C. C. A. 63, 122 Fed. 853."

The cases of **Leek Milling Co. v. Langford**, 81 Miss. 728, 33 So. 492, and **Bolling v. Red Snapper Sauce Co.**, 97 Miss. 785, involved a total repudiation and abandonment of contracts for the sale of commodities while the contracts were executory on both sides.

The case of **Carter v. Witherspoon**, (Miss.), 126 So. 388, involved a contract for the performing of personal services, which was repudiated entirely while executory.

The case of **Travelers' Protective Ass'n. v. Stevens**, (Ark.) 49 S. W. (2), 364, is readily distinguished, as appears from the statement of the court at page 368, where the following language is used:

> "The defendant denied that it was liable to the plaintiff for any amount under the terms of the policy. It did not offer to pay him the weekly indemnity for total disability as long as such disability should continue. It sought to defeat his claim altogether."

The case of **National Life & Accident Insurance Co. v. Whitfield**, (Ark.), 53 S. W. (2), 10, is controlled by subsequent decisions from the Supreme Court of Arkansas, in which the **Aetna Life Insurance Co. v. Phyfer**, 160 Ark. 98, 254 S. W. 335, is distinguished.

Other cases cited by appellant are readily distinguished in the light of the cases cited herein.

There are no facts in this record which take the case out of the prevailing rule. Appellant's counsel take the position that the appellee should have recognized that the appellant was totally and permanently disabled. That it wrongfully denied liability for monthly disability claims by reason whereof it breached its contract, and the appellant should recover the commuted value of all monthly disability payments on each of the policies, based upon the theory that he would live throughout his expectancy. Appellant's counsel in their brief direct the court to the reports submitted by the appellant to the company, from which it is contended that the appellee should have recognized the appellant's total and permanent disability. The appellant underwent an operation for appendicitis in December, 1930. His disability claim was allowed as of January 13th, 1931. On three separate occasions between the 13th day of January, 1931, and the 1st of January, 1933, the appellee expressed doubt as to whether or not the appellant was totally and premanently disabled within the meaning of the policies. During such period, upon more than one occasion, it took the position that the appellant was no longer totally and permanently disabled within the meaning of the policies, and payments of monthly disability claims were temporarily withheld. In each instance, however, as the result of continued correspondent and exchange of information, the payment of monthly disability claims under each of the policies, accompanied by waiver of premiums maturing upon the policies, was had, with the result that upon the 1st day of February, 1933, all monthly disability claims on each of the policies, including those maturing January 13th, 1933,

had been paid in full, and the appellee had waived all premiums maturing on the earlier policy up to August 9th, 1933 and on the second policy to the 7th of March, 1933. (R. 76-196).

Prior to the maturity of the disability claims maturing February 7th, 1933, the appellee reconsidered the claim. The appellant was a lawyer almost 31 years of age, was operated on for appendicitis by Dr. H. R. Shands of Jackson, Mississippi, who reported to the company on April 13th, 1931, (R. 80), that he had treated the appellant for for nothing but appendicitis and indicated that there was nothing about the appendicitis operation which would cause him to be totally and permanently disabled.

Under date of April 15th, 1931, (R. 83), the company's examiner, Dr. Huggins, reported that appellant was satisfactorily recuperating and should be able to go to work in sixty days. And again under date of June 24th, 1931, Dr. Huggins reported that the appellant was able to attend to duties not requiring hard labor or excessive exertion, (R. 87). Again under date of August 6th, (R. 93-94), Dr. Huggins, the company's examiner, reported that the appellant was able to do mental work.

Under date of May 4th, 1932, (R. 102), Dr. Beck of Mobile, Alabama, reported some myocardial insufficiency, but was unwilling to state that such trouble was functional. However, on or about the 24th day of January, 1933, the assured submitted himself for re-examination to Dr. I. C. Huggins, the company's examiner at Jackson, Mississippi, (R.110-112), who examined him thoroughly, and who stated that the appellant suffered from low blood pressure, seemed

to have no energy, and complained of indigestion. That Dr. Beck had diagnosed his case as heart trouble, and again (R. 113), Dr. Huggins stated that he was of the opinion that the appellant could do some work. Dr. Huggins testified at the trial (R. 132) that he had examined the appellant very carefully on January 26th, 1933, that he found no indication whatsoever of heart trouble. He testified, however, that myocarditis would not have prevented the appellant from working. He stated that if the appellant was suffering from myocarditis or indocarditis, he would have lost weight, whereas, as a matter of fact, no such condition existed. As a matter of fact, the record did not disclose that the appellant had lost any weight. The appellant and the appellee continued to correspond on the subject, (R. 112-120) until July 12th, 1933, when the appellee suggested to appellant's counsel that he submit himself for re-examination to some other physician.

The position of the appellee at all times was that if the appellant was totally and permanently disabled, he was entitled to his monthly disability claim with waiver of premium. On former occasions the appellant had required the appellee to submit himself to its examiner at Jackson, Mississippi, Dr. Huggins, but in order to inconvenience the appellee as little as possible requested that he permit Dr. Dorsett, a physician residing in the same community with appellant, to examine him, with the result that Dr. Dorsett reported that he was suffering with myocarditis. (R. 120-124). This was the first information that the company had that the appellant was suffering from myocarditis. The former reports had revealed some form of heart trouble. The company understood that the same was based upon

blood pressure, and not upon objective symptoms of a heart condition, (Testimony Frank S. Lantry, R. 137), whereupon the company promptly waived premiums upon the policy in question and tendered all accrued monthly estimates upon each of the policies. The tender was unconditional and has been continued. While the question of good faith upon the part of appellant is not at issue, since appellant's declaration (R. 1) charges no bad faith, there was no proof offered of dislike or ill will. Upon the other hand, Dr. Huggins, the company's examiner, testified that, while he did not know the appellant intimately or other than casually, personally he liked him. The appellee in making out his defense offered to prove by Mr. Lantry that claims of this character offered a very broad opportunity for fictitious claims, to which testimony the appellant objected. The court desired to know upon what theory the appellee offered such proof. Counsel explained that it was for the purpose of meeting any charge of bad faith, to which appellant's counsel replied that the appellant complained of breach of the contract and not bad faith, and that the question of bad faith was not in issue. Whereupon the trial court excluded the appellee's testimony. The record is as follows:

> "Q. Please tell the Court in claims of this character, without any reflection upon the plaintiff whatsoever, whether or not there is a very broad or wide opportunity for fictitious claims?
>
> "By Mr. Mize: Object to that.
>
> "By Mr. Watkins: They are charging us with bad faith. We want to show the only—
>
> "By the Court: Do you charge bad faith?

"By Mr. Mize: My objection is, if the Court please, it is just a question of breaching the contract, or whether he did not, and the good faith or bad faith is immaterial.

"By the Court: The Court will sustain the objection. Just charged with a breach. That is the reason I sustain the objection." (R. 134).

The question, of course, as stated by appellant's counsel, did not turn upon the presence or absence of good faith. The appellant was relying upon a breach of the contract which justified it in treating the same at an end and suing for breach thereof. It must be borne in mind, however, that under the policy contracts, the appellee was not liable for monthly disability claims if the appellant was able, without substantial injury to his health, to do any kind of work. **Lumbra v. United States**, 290 U. S. 551, 54 S. Ct. 272.

Even the presence of serious bodily disability did not necessarily render the assured totally and permanently disabled. **Nicolay v. United States**, 51 Fed. (2d) 170; **United States v. Harrison** (C. C. A. 4th), 49 Fed. (2d) 227; **Long v. United States** (C. C. A. 4) 59 Fed. (2d) 602; **United States v. Linkhart**, (C. C. A. 7) 64 Fed. (2d) 747. So even if it be true that assured had some kind of heart trouble, of which the appellee had notice, he was a young man, a member of a profession which required no serious physical exertion, and it was for such reason that the appellee came to the conclusion and acted thereupon, subsequent to January 1st, 1933 up until August 9th, 1933, that the appellant was not totally and permanently disabled.

POINT II.

THE CONTRACTS WERE FULLY EXECUTED SO FAR AS THE APPELLANT WAS CONCERNED, AND APPELLEE'S REMEDY ADEQUATE.

All monthly disability claims were paid by the appellee upon each of the policies involved up to and including the payments maturing January 13th, 1933. Refusal was had, however, by the appellee to make the payment falling due February 13th, 1933. The appellant's declaration alleges, (R. 1) and the undisputed proof shows, that prior thereto the appellant had submitted to the appellee all the proof thereof which the appellee had the right, under the terms of the contracts, to require from the appellant. He had submitted himself when requested to appellant's examiner and had filled out the additional blank furnished him by the appellant, (R. 19). Assuming that upon February 13th, 1933, the appellant was totally and presumptively permanently disabled within the meaning of the policy, the appellee was in default, and upon the 14th day of February, 1933, the appellant might have sued the appellee for monthly disability upon each of the policies in question. The contract was executed so far as the appellant was concerned, and the time for performance on the part of the appellee had arrived. It was unneccessary for the appellant to pay the premium on either policy if he continued totally disabled. The policy contracts provided, (R. 6), as follows:

> "In event of default in payment of premium after the Insured has become totally disabled as above defined, the Policy will be restored and the benefits shall be the same as if said default had

not occurred, provided due proof that the insured is and has been continuously from date of default so totally disabled and that such disability will continue for life or has continued for a period of not less than three consecutive months, is received by the Company not later than six months after said default."

If the appellant was totally and permanently disabled, proof thereof having been submitted by the appellant, premiums were no longer payable under either policy, and as Judge Denison says in his dissenting opinion, there was no necessity for plaintiff to take any steps. A judgment for the plaintiff for monthly disability claims would have carried with it the adjudication that the appellant was totally and presumptively permanently disabled and that the appellee was not liable for further premiums during such disability, and such adjudication would have had the effect of waiving the premium. A judgment for the plaintiff for a period of disability would have been no bar to a subsequent action. **Williams v. Luckett**, 26 So. 967, 77 Miss. 394; **Rosso v. New York Life Ins. Co.**, 157 Miss. 469, 128 So. 343.

The appellant being so disabled could recover not only the monthly disability payments in default, but interest thereupon, which is the usual measure of damages for failure to pay the fixed sum of money. See Restatement of the Law Contracts pp. 337; **Armstrong v. American Exch. Nat. Bank**, 133 U. S. 433, 10 S. Ct. 450, 33 L. ed. 747; **Potter v. Gardner**, 5 Pet. 718, 8 L. ed. 285; **Northern Pacific R. Co. v. Goss**, 203 Fed. 904, 122 C. C. A. 198; **Milburn v. Thirty-Five Thousand Boxes of Oranges and Lemons**, 57 Fed. 236, 6 C. C. A. 317; **Bain v. Peters**, 44 Fed. 307.

Adequate facilities for instituting such a suit were afforded to the appellant in the court of a Justice of the Peace, and upon the recovery of a judgment therefor, and if the appellee should appeal the case to the Circuit Court, it would have been subjected not only to the payment of claims, but interest, costs and 10% damages. If an appeal should be prosecuted to the Supreme Court of the State of Mississippi from such judgment, the interest would be compounded, and to which would be added 5% damages. See Mississippi Code 1930, Sections 67, 704, and 3387. Such liability has been deemed sufficient to deter any insurer from capricious denial of liability for disability claims. Appellant suggests, however, that in filing suit for disability claims without payment of the premiums upon the policy, he might be subjected to the hazard of the actual forfeiture of the policies for nonpayment of the premiums, if in fact, it should appear that he was not totally and permanently disabled within the meaning of the policy. This merely amounts to the statement that the appellee company, with its claim office situated a long distance from the appellant's locality, must be able to determine the genuineness of the appellant's total disability with more accuracy than the claimant himself. The proof showed that the appellee in the City of New York maintained a large claim department, and that there were propounded against it approximately 25,000 claims per annum. (Lantry, R. 134). However, the appellant's apprehensions are unfounded.

As pointed out by Judge Cardozo in the case of Kelly v. Security Mutual Life Ins. Co., 186 N. Y. 16, the claimant would be entitled to an equitable remedy. Certainly, such

remedy would be available to a claimant under the declaratory judgment act of Congress in the federal court, and if totally and permanently disabled within the meaning of the policy, would be able to obtain, not only the preservation of the contract with waiver of premiums, but could secure a personal decree for accrued disabilities, and under the equity practice, a solicitor's fee would be taxed in favor of the complainant. A meritorious claimant would be entitled to equitable relief in Mississippi. See Franklin Fire Ins. Co. v. Taylor, 52 Miss. 441, Liverpool, London & Globe Ins. Co. v. Hinton, 77 So. 652, 116 Miss. 754, Palmetto Fire Ins. Co. v. Allen, 114 So. 145, 148 Miss. 97.

And for a capricious and willful breach of the contract on the part of the insurer, if such there was, a reasonable attorney's fee might be included as part of the equitable relief. Y. & M. V. R. Co. v. Consumers Ice & Power Co., 57 So. 657, 109 Miss. 43.

POINT III.

THE APPELLEE AT NO TIME REPUDIATED ITS CONTRACTS OF INSURANCE WITH THE APPELLANT.

Appellant's counsel call attention to the fact that, as to Policy No. 10,340,538, premium maturing February 7, 1933, on March 1st, 1933, seven days before the expiration of the thirty days of grace for the payment of the premium, appellee took the position that the appellant was not, on February 7th, 1933, totally and permanently disabled within the meaning of the policy, and that the premium maturing February 7th, 1933, payment of which had theretofore been waived, should be paid, (R. 113). Upon April 13, 1933, the premium not having been paid, the appellee re-

quested the appellant to become reinstated, for which purpose blank was enclosed, (R. 117); and upon June 5th, 1933, there having been no application for reinstatment, appellant was advised that the cash surrender value of the policy had been applied to the purchase of extended insurance, (R.118), which carried the policy for the full face to June 20th, 1937. The premium under Policy No. 7,802,419 had previously been waived up to July 7th, 1933. The usual premium notice was sent out advising the appellant of the maturity of such premium about June 7th, 1933, (R. 118). During the period of grace, however, the appellant re-submitted himself to Dr. Dorsett and, under date of August 9th, 1933, the appellee tendered all accrued monthly disability payments under each of the policies and waived maturing premiums upon both policies, which course of action has been consistently adhered to by the appellee up to the present time. The appellee was not repudiating appellant's contracts of insurance by such action, but assuming as it did, that the appellant was not continuously totally and permanently disabled within the meaning of the policy, it was invoking the very terms of the policy contracts themselves. The payment of the premiums was the essence of the policies in question. **Bergholm v. Peoria Life Insurance Co.**, 76 L. Ed. 416, 284 U. S. 489.

The policies provided for the payment of a semi-annual premium thereupon, and the existence of the policies was conditioned upon the payment of the premiums; if the premiums were not paid on or before the expiration of the thirty days of grace, the policies lapsed subject to the right of reinstatement, and if there was no reinstatemtn, the policies provided, where three full annual premiums had been

paid, for the application of the cash surrender value of the policy towards the purchase of extended insurance upon default. The appellee was merely calling the appellant's attention to the consequences which would follow non-payment of premiums, assuming that he was not totally and permanently disabled within the meaning of the policies. The appellee was reaffirming, rather than repudiating, the policies. The appellee did not deny the existence or the validity of either of the policies of insurance. Upon the other hand, appellee expressly admitted the binding effect of each of them. It admitted that if the appellant was totally and permanently disabled within the meaning of the policies in question, he was entitled to and should have the monthly disability payments therein provided, with waiver of premiums. The disagreement between them was not over the existence or the validity of either of the policies. The disagreement was in respect to the question of total and permanent disability within the meaning of the policies, as a matter of fact. It was the position of the appellant that he was totally and permanently disabled and could do no work of any kind except at the hazard of his health. The appellee admitted that he was suffering from some physical disability, but took the position that he could do some work in connection with his profession without harm or injury to himself.

Policy No. 10,340,538 was automatically carried, by reason of its cash surrender value, to June 20th, 1937, without the payment of any premiums (R. 164). This period may be beyond the life of the insured, but certainly the appellee was not repudiating the contract. That question

was presented in the case of Kimel v. Missouri State Life Ins. Co., 71 F. (2d) 923 C. C. A. In that case the insurer, in violation of its contract with the insured, refused to waive the payment of premium, but made an endorsement upon the policy, charging the premium to the policy, with interest thereupon. The court, in passing upon the question, used the following language:

> "An offer to perform in accordance with the promisor's interpretation of the contract although erroneous, if made in good faith, is not such a clear and unequivocal refusal to perform as amounts to a renunciation giving rise to an anticipatory breach.
>
> "As stated in Armstrong v. Ross, 61 W. Va. 38, 55 S. E. 895, 899:
>
> "'If this were not the law, it would be a dangerous thing to stand upon a controverted construction of a contract. Every man would act at his peril in such cases, and be subjected to the alternative of acquiescing in the interpretation adopted by his opponent, or putting to hazard his entire interest in the contract. The courts have never imposed terms so harsh, or burdens of such weight. It would amount to a virtual denial of the right to insist upon an honest, but erroneous, interpretation.'"

For, as here, the insured was demanding of the Company more than he was entitled to. As early as March 9, 1933, (R. 114) appellant's counsel demanded $28,980.00 from the appellee. The appellee had done nothing but in-

dicate that the assured was not totally and permanently disabled and that the premium maturing on Policy No. 10,340,538 February 7, 1933, which should be paid by the 7th of March, 1933, was due. At that time the premium under Policy 7,802,419 was paid up to July 7, 1933, and the premium was not requested until June 7, 1933 (R. 115). The utmost that may be said about the situation is that the parties disagreed about their legal rights.

In the case of **Federal Life Ins. Co. v. Rascoe**, supra, the policy had no cash surrender value, and the company undertook to cancel the same for non-payment of premium in accordance with the terms of the policy. Judge Denison in his dissenting opinion points out that the defendant did not question the validity of the contract. They disagreed about the insurer's obligation to pay under the facts. Judge Denison used the following language:

> "Further, I do not find in the facts such an absolute repudiation of the contract as justifies the application of the anticipatory breach rule. Such a repudiation cannot be found in the final cancellation made by the insurance company; that cancellation was an act in express pursuance of the contract, and not in repudiation of it; it was a termination of future liability, and not at all a repudiation of any accrued and existing obligation. Nor can it be found, as I think, in the refusal to pay. What defendant really did was to deny that there was any breach which had obligated it to pay or which obligated it to pay any more. Defendant never has questioned the entire validity of the contract, or denied its continuing liability

to pay anything which, under the contract, it ought to pay. While there are decisions which find the necessary basis in a mere denial or breach, I doubt whether they give due regard to what ought to be the character of a repudiation effective to create an obligation inconsistent with the express terms of the contract."

Necessarily in each of the cases cited herein in support of appellee's theory of this case, where there was a failure to pay the premium upon denial of liability for monthly disability claims, by the very terms of the policy itself the same results would follow. In the case of **Kimmel v. Missouri State Life Ins. Co.**, 71 Fed. (2) 921, in respect to repudiation of the contract the court used the following language:

"To amount to an anticipatory breach of a contract, the renunciation by the promisor must be clear and unequivocal, and the refusal to perform must be of the whole contract or of a covenant going to the whole consideration."

Citing:

"Roehm v. Horst, 178 U. S. 1, 20 S. Ct. 780, 44 L. Ed. 953; Dingley v. Oler, 117 U. S. 490, 6 S. Ct. 850, 29 L. Ed. 984; McNamara v. Cerf (C. C. A. 2) 4 F. (2d) 997; Suburban Impr. Co. v. Scott Lumber Co. (C. C. A. 4) 67 F. (2d) 835, 837, 90 A. L. R. 830; Frank F. Pels Co. v. Saxony Spinning Co. (C. C. A. 4) 287 F. 282; Peoskey Portland Cement Co. v. E. V. Benjamin Co. (C. C. A. 6) 296 F. 9, 11; Goldwyn Distributing Corp.

v. Brenneman (C. C. A. 8) 13 F. (2d) 105, 107; Hoggson Bros. v. First Nat. Bank of Roswell (C. C. A. 8) 231 F. 869."

The same rule was announced by the Circuit Court of Appeals, 5th Circuit, in the instant case, using the following language:

"And for another reason there could here be no recovery. In order to constitute an anticipatory breach of the entire contract there must be a clear and unequivocal repudiation by the promisor of all that remains to be performed, a refusal to be further bound by the contract. Dingley v. Oler, 117 U. S. 496, 6 S. Ct. 850, 29 L. Ed. 984; Roehm v. Horst, 178 U. S. 1, 20 S. Ct. 780, 44 L. Ed. 953; Kimel v. Missouri State Life Ins. Co. (C. C. A.) 71 F. (2d) 921, and cases cited. A reading of the correspondence above set out discloses that at no time did the insurance company renounce or repudiate its policies, but founded everything it did upon the terms of them. Even its declaration of lapse and invitation to reinstatement were no repudiation, but in pursuance of their express provisions. All that happened was that the company misjudged its obligations. Such an error made in good faith, whether founded in mistake of law or fact, is not repudiation, and does not end a continuing contract, but calls only for its enforcement according to its terms. Mutual Life Ins. Co. v. Marsh, 186 Ark. 861, 56 S. W. (2d) 433; Massachusetts Protective Ass'n v. Jurney, 188 Ark. 821, 68 S. W. (2d) 455. In this

case the company acknowledged its error and tendered full compensation, together with costs. The insured had no right to anything more.

"Judgment affirmed."

POINT IV.

THE RULE CONTENDED FOR BY APPELLANT IN THIS CASE WOULD BE DISASTROUS TO THE OTHER POLICYHOLDERS IN THE APPELLEE COMPANY.

The appellee, the New York Life Insurance Company, is a mutual company. The position of the appellant is based upon the assertion that appellee, at its peril, must clearly determine its liability to the appellant for monthly disability payments; that the mere failure of the appellee to accurately determine such liability and to make disability payments in accordance with the terms of the policies, converted such contracts from monthly disability payment policies to matured claims for the then present value of all monthly disability payments, assuming that the appellant would live throughout his expectancy and continue totally disabled during such period.

The proof shows undisputedly that there are many claims presented for disability payments which might be termed boundary line claims,—that is to say, doubtful claims,—and the appellee regarded this case as a boundary line claim. The appellee offered to prove, but the District Judge excluded the testimony because appellant's counsel made no contention of bad faith, that these claims afford a very wide opportunity for fraudulent and fictitious claims. We make this statement, with all deference to the

present litigant and his counsel, without reference to the present case. There are many cases in which the disability is not total. The insured may work, or be able to work, a considerable part of the time.

In the case of disability claims there must be honest differences of opinion, and where the company believes that the claim is not justified it should have the right to appeal to the courts without a bludgeon being held over its head.

We call the attention of the court to the following facts:

We have examined the Federal Digest War Risk Cases from January 1, 1931, to January 1, 1935, and there are 254 reported cases. In only one case was a verdict directed for the defendant. There were 253 verdicts rendered for plaintiffs; of these, the appellate courts reversed 130, holding that the evidence was insufficient to go to the jury. In 123 cases, however, the courts held that, while the jury might have decided either way, the evidence was sufficient to sustain a verdict for the plaintiff. Facts in respect to such litigation in state courts during the same period are practically as follows:

Total number of cases 150; verdict for plaintiffs by the jury in each case except one where the court directed verdict for defendant, 25 cases reversed on appeal, evidence being insufficient. In 125 cases evidence held sufficient to justify verdict either way. So, it is apparent that cases of this character present a very strong appeal to juries.

If appellant's theory is to be adopted, in each of the foregoing cases where plaintiff's evidence was held sufficient to justify a verdict for the plaintiff, though a verdict for the defendant might have been rendered under the same facts, as a matter of law the insured plaintiff would have the right to treat the contract as rescinded and recover damages on an anticipatory breach, and would be entitled to the commuted value of all monthly disability benefits to his expectancy.

If this view is to prevail, suits upon monthly disability claims will disappear and, in place thereof, so long as the companies would last, suits would be brought for an anticipatory breach. Such a course would have a disastrous effect upon the interest of other policyholders in mutual companies.

At the last meeting of the American Bar Association a very interesting paper upon this subject was read by the Hon. John F. Handy of Boston, Mass., wherein the following language was used:

> "Under the disability claim where the company has either admitted liability or courts have adjudged the insured entitled to the benefits, the insurer is required to set up a reserve to meet its future liability under such claim. This reserve is based on sanctioned mortality tables based on impaired lives and the insurance departments of the several states have recognized and approved such a method of anticipating future liability. However, under the anticipatory breach theory where the determination of damages is purely

speculative and based on mortality tables for unimpaired lives, the amount of the judgment would be in many cases at least five times the amount of the reserve which the company would be required to set up under the laws to meet its obligations under the contract.

"This leads to the inevitable conclusion that a universal acceptance of applying the doctrine to disability contracts would result in the insolvency or the impairing of the solvency of every insurance company selling such contracts. This is a serious result and affects every policyholder in the country. While in a few isolated cases there may be insurers who will deny liability in bad faith with the resultant expense placed on the policyholders to collect his just claim, yet the sanctioning of such doctrine would result in a far greater loss to the public at large so that the few must suffer in order that the welfare of the group may be assured."

In the case of Kelly v. Security Mutual Life Insurance Company (App. Court of New York), 78 N. E. 684, the court said:

"In this state it seems to be limited to contracts to marry (Burtis v. Thompson, 42 N. Y. 236, 1 Am. Rep. 516); for personal services (Howard v. Daly, 61 N. Y. 362, 19 Am. Rep. 285) and for the manufacture or sale of goods (Windmuller v. Pope, 107 N. Y. 674, 14 N. E. 436; Nichols v. Scranton Steel Co., 137 N. Y. 471, 33 N. E. 561).

At least we have not extended it to mutual life insurance policies, perhaps for the reason that the question of fact opened to unscrupulous persons by such extension might undermine the solvency of the company and inflict gross injustice upon the other policyholders."

In the instant case the Circuit Court of Appeals, Fifth Circuit, used the following language:

"If he were allowed a present recovery for all future benefits, the calculations on which insurance business is done would be upset, and the purposes for which the benefits were made payable only in installments would often be defeated. On a war risk insurance contract for example, it has never been supposed that the insured by winning a contest touching his rights, even when they were totally denied, could recover the present value of future installments contrary to the very terms of the insurance. Compare United States v. Worley, Adm'x, 281 U. S. 339, 50 S. Ct. 291, 74 L. Ed. 887. Anticipatory breach cannot with this effect be asserted in the present case."

In the dissenting opinion of Judge Denison in the Rascoe case, the following language is used:

"In my judgment, this case illustrates the evils of laxity in permitting a premature recovery. In such a case as this (as facts often are, though possibly not in this case), plaintiff in a year or two may recover entirely or (if the case

is as bad as here claimed) is very likely not to live long. In either case the true liability is for a short term; but the recovery has been upon the basis of the full expectation of life of a healthy person,—though no error in this respect was duly saved."

POINT V.

THE APPELLANT'S EVIDENCE AS TO DAMAGE WAS SO SPECULATIVE AND INDEFINITE AS NOT TO PERMIT A VERDICT AND JUDGMENT IN HIS FAVOR.

The appellant at the time of the trial of this case was thirty-two years of age. He had an expectany, according to the proof, of 34.63 years (R.128), using the table of mortality applicable to normal healthy persons. Notwithstanding the position of appellant that he was totally and permanently disabled, it was his position that he would probably never recover, but might live out his expectancy. J. E. Beck, (R. 74); Dr. Gay, (R. 128); Dr. Copeland, (R. 127).

We respectfully submit that, as to whether or not the appellant would recover, was a matter of conjecture; and if he did or did not recover, how long he would live was purely a matter of speculation. Certainly, the appellant could not recover except and unless he could show the jury: first, as to whether or not he would ever cease to be disabled, and if so, how many years would elapse; and second, if he continued totally disabled, how long he would live. But we submit, if Your Honors please, this was a matter purely of conjecture.

It is the position of the appellant that the jury should have been permitted to cross the gulf and, notwithstanding the total lack of testimony, determine without any sufficient evidence these important facts. Merely to state the proposition is to answer it. Before a plaintiff may recover, the burden of proof rests upon him to prove each and every substantial allegation in his declaration, not always by direct testimony, circumstances are permissible; but, whether by direct or circumstantial evidence, the proof must be furnished and the matter may not be left to doubt, conjecture and speculation. A number of things might happen to the appellant: first, he might continue totally disabled and live out his expectancy; second, he might ultimately recover; third, he might die prior to his expectancy. But which of these three things will happen, was not susceptible to proof and, certainly, was not in this case proven, either by direct or circumstantial evidence.

It is universally held that unless the plaintiff shall produce substantial evidence to establish every material element in his case, a peremptory instruction should be directed for the defendant. **Jenkins & Reynolds v. Alpena Portland Cement Co.** (C. C. A.) 147 Fed. 641; **Virginia & S. W. Ry. Co. v. Hawks** (C. C. A.) 160 Fed. 348; **Wilson v. Eisner** (C. C. A.) 282 Fed. 38.

Evidence which raises a mere conjecture or suspicion is not sufficient to take the case to the jury. **R. R. Co. v. Howe** (C. C. A.) 191 F. 776.

A case is properly taken from the jury where the evidence rests upon conjecture and speculation. **Gill v. Waterhouse** (C. C. A.) 245 Fed. 75.

The rule is well established that damages which are uncertain or speculative cannot be made the basis of recovery. **Vicksburg v. Ragsdale, 46 Miss., 458; Y. & M. V. R. R. Co. v. Williams, 114 Miss., 236; 74 So., 835; Cincinnati Illuminating Co. v. Western Siemens Lungren, 152 U. S. 200, 38 L. Ed. 411; Union Pacific Ry. v. Taggart, 149 U. S. 698, 37 L. Ed. 905; Hollweg v. Scharfer Brokerage Co., 197 F. 689; Ralph v. Rathburn Co., (C. C. A.) 75 F. 971.**

The only damages which may be recovered are such as may be proven with reasonable certainty. **Hollweg v. Scharfer Brokerage Co., 197 F. 689.**

No recovery may rest upon guess work or inference. **Smelting Co. v. Riverside Dairies & Stock Farm, (C. C. A.) 236 F. 510; Western Union v. Totten, (C. C. A.) 141 F. 533; South African Reduction Co. v. Beck, (C. C. A.) 120 F. 88.**

SUMMARY

We respectfully submit that the judgment of the Circuit Court of Appeals in the instant case should be affirmed for the following reasons:

(1) The policies sued upon provide for the payment of stipulated sums of money at definite periods. The parties have agreed upon the measure of damages for a breach of the contracts.

(2) Under no circumstances could the appellee be liable for damages on the theory of an anticipatory breach, except and unless there was an absolute unconditional and unambiguous repudiation of the entire contract. The appellee has not repudiated its contracts, but, upon the other

hand, has continuously and uniformally invoked the provisions thereof.

(3) The appellant bases his right of recovery upon what is known as the Rascoe Case. The doctrine therein announced in the majority opinion, is contrary to the great weight of authority, both state and federal.

(4) The contracts were not wholly executory, in that, assuming that the appellant was totally and presumably permanently disabled, within the meaning of the policy, the contracts were executed as to him.

(5) The appellee's obligations were contingent upon plaintiff's future condition from time to time, and unless the appellant shall continue disabled, appellee's liability will not arise.

(6) The application of the rule contended for by appellant would be disastrous as to other policyholders in the company.

(7) The appellant's damages, if any, other than such as are provided by the policy contracts, are too speculative and indefinite to constitute the basis for a judgment, since it is not possible, with any reasonable degree of certainty, to ascertain whether or not the appellant will recover, or how long the appellant will live, if totally and permanently disabled.

We respectfully submit that the judgment appealed from should be affirmed.

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SUPREME COURT OF THE UNITED STATES.

No. 751.—October Term, 1934.

Roy T. Mobley, Petitioner, *vs.* The New York Life Insurance Company.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[May 27, 1935.]

Mr. Justice Butler delivered the opinion of the Court.

In 1933 petitioner brought two actions against respondent in the circuit court of Harrison county, Mississippi. There being diversity of citizenship, defendant removed them to the federal court for the southern district of that State. The court consolidated the cases for trial and, at the close of the evidence, directed verdicts and entered judgments for defendant. The Circuit Court of Appeals affirmed. 74 F. (2d) 588. And, upon petitioner's claim that the decision in this case conflicts with that of the Circuit Court of Appeals for the Sixth Circuit in *Federal Life Ins. Co.* v. *Rascoe*, 12 F. (2d) 693, and other cases, this court granted a writ of certiorari. 294 U. S. —.

The first action, commenced July 25, is based on an alleged breach by anticipatory repudiation of an insurance policy for $5,000 issued August 7, 1928, by defendant on the life of plaintiff, payable to his wife as beneficiary and providing for monthly payments in case of disability. Plaintiff prays judgment for $33,980.[1] The other, commenced November 1, is based on a similar life policy for $2,000 dated April 9, 1925, and payable to his mother. The prayer is for $11,600.[2] His declarations may be construed to include demands for $70 per month during claimed expectation of life plus the face amounts of the policies, all reduced to present

[1]The record does not disclose how the amount, $33,980, was reached. Plaintiff's expectation of life was taken at 34½ years or 414 months. Payments of $50 per month would be $20,700. If the face of the policy, $5,000, be added, the total is $25,700. But it seems that payments of $70 instead of $50 per month were taken. Then the installments without discount would be $70 × 414 or $28,980, plus $5,000 equals $33,980.

[2]The declaration alleges an expectation of life of 40 years. Installments of $20 per month amount to $9,600. Adding $2,000, the face amount of the policy, produces the amount claimed.

value. The insured seeks not payment of disability benefits as they mature according to the insurer's promises nor the damages resulting from its failure regularly to pay installments when due. His claim, as indicated by the evidence offered, is at least for the present value of the monthly payments during his expectation of life and also for the present worth of the face value of the policy.

The question first to confront us is whether the evidence is sufficient to warrant a finding that the company repudiated the policies.

There is no controversy as to the facts. Except as above stated, the policies are alike. Each was issued in consideration of specified premiums payable semi-annually in advance during the life of the insured. They provide: That whenever the insured is so disabled by bodily injury or disease that he is wholly prevented from performing any work, following any occupation or engaging in any business for remuneration and the company receives proof that this disability will continue for life or that it has existed for the three months next preceding the proof, the company will pay monthly ten dollars per thousand of face value and waive premiums; that, before making any income payment or waiving any premium, the company may demand proof of continuance of total disability (but not oftener than once a year after disability has continued for two full years) and that, upon failure to furnish such proof, no further payments will be made nor premiums waived.

December 13, 1930, the plaintiff suffered an acute attack of appendicitis for which he submitted to surgery. March 30, 1931, not having regained his health, he claimed monthly payments for permanent and total disability. On the proof he submitted and a physical examination made in its behalf, the company allowed the claim, waived premiums, and paid him $70 per month—$50 under one policy and $20 under the other—from January 13. The company caused his condition quite frequently to be observed. Several times between June 13, 1931, and March 1, 1933, it concluded that he was not continuously and totally disabled. On each of these occasions it notified him that no further income payments would be made and that premiums would no longer be waived. But in every instance, upon his insistence that he continued to be disabled and after further investigation and consideration, the company changed its ruling, paid past due benefits, resumed monthly payments and waived premiums.

March 1, 1933, the company wrote him stating it appeared that for some time he had not been continuously disabled within the meaning of the policies, that no further monthly payments would be made and that the premiums due on and after February 7 became payable according to the terms of the contracts. Then, through his attorney, plaintiff demanded payment of the policies in full "for the remainder of his natural expectancy, which is thirty-four years and six months from this date which under the terms of said policies will amount to $28,980", and warned that unless the matter was adjusted within seven days plaintiff would bring suit. March 17, the company wrote the attorney explaining that information obtained as a result of its customary investigation indicated that insured had sufficiently recovered to do some remunerative work and that in view of the reports received it could not consider him totally disabled, and declared that it would adhere to its decision.

April 13, it notified plaintiff that the $5,000 policy had lapsed and urged him to apply for its reinstatement. Later, it wrote that, application for reinstatement not having been made, the value of the policy had been applied to continue the insurance in force until June 20, 1937. On June 9 it notified him that premium on the $2,000 policy was about to mature. July 8, his attorney wrote the company that, as plaintiff was totally and permanently disabled and had demanded the value of the disability benefits, it was not authorized to apply the value of the policy to purchase continued insurance and that he did not agree to that application.

July 12 the company notified plaintiff that it was willing to give further consideration to his claim for disability benefits and asked for a statement from his attending physician as to his condition since the early part of January, 1933. And it stated that one of its physicians would call to make a medical examination. The examination was made July 24. On the next day plaintiff commenced the first of these actions. The company received report of the examination July 28. It stated that from December 13, 1930, plaintiff had been prevented by disability from engaging in any occupation, that he will be permanently prevented from strenuous occupation and gave details concerning his condition. The examiner made a supplemental report to the effect that plaintiff was not confined to his bed or house and was able to do some work but not hard work.

Thereupon the company reconsidered plaintiff's claim and, August 9, concluded that he continued to be totally and permanently disabled within the meaning of the policies. It caused to be tendered to him notices of waiver of premiums and checks to cover all disability payments accruing on both policies to and including July 13, 1933. He rejected the offers on the ground that the company was indebted to him as alleged in the declaration. Tenders of the disability benefits were thereafter regularly made on the thirteenth of each month to and including February 13, 1934, and have been kept good by payments into court. It is stipulated that plaintiff was continuously totally and permanently disabled from the date of the operation until the date of the trial.

The significance of the correspondence, the gist of which we have given, is to be ascertained having regard to the meaning of the provisions of the policies that are here involved. The insurer's promise to pay monthly benefits was conditioned on two events: the insured's disability as defined, and the specified proof. Its obligation was not an unqualified one to pay or to pay on the mere occurrence of disability but only after proof of that fact. Similarily its agreement to continue payments once begun was conditioned upon the persistence of insured's disability and, at the election of the insurer, proof of that fact by physical examination, but after two years not oftener than once a year. These conditions serve to define the insurer's promises but impose no obligation on the insured. By payment of the premiums he acquired the options and privileges specified. He did not promise or in any manner bind himself to do or refrain from doing anything. The provision that the company may require proof of continuance of disability conditions the right of the insured to have future installments but imposes no obligation upon him. He was at liberty, without breach of contract, to refrain from making the claim or to refuse disclosure of his condition or to permit examination.

Repudiation by one party, to be sufficient in any case to entitle the other to treat the contract as absolutely and finally broken and to recover damages as upon total breach, must at least amount to an unqualified refusal, or declaration of inability, substantially to perform according to the terms of his obligation. *Roehm* v. *Horst*, 178 U. S. 1, 14, 15. *Smoot's Case*, 15 Wall. 36, 49. *Dingley* v. *Oler*, 117 U. S. 490, 503. *Kimel* v. *Missouri State Life Ins. Co.*,

71 F. (2d) 921, 923. Mere refusal, upon mistake or misunderstanding as to matters of fact or upon an erroneous construction of the disability clause, to pay a monthly benefit when due is sufficient to constitute a breach of that provision, but it does not amount to a renunciation or repudiation of the policy. *Daley* v. *People's Building, &c. Assoc.*, 178 Mass. 13, 18. There is nothing to show that any refusal of the company to pay the monthly disability benefits was not made in good faith. Its position appears at all times to have been that, if plaintiff was disabled as defined in the policy, he was entitled to the monthly benefits and waiver of premiums. The fact that, with additional information and upon further consideration, it gave greater weight to his claims and decided that he was continuously disabled as defined in the policies and so entitled to the specified payments goes to show adherence to, rather than repudiation of, the contracts. The company's efforts to have the policies kept in force were inconsistent with purpose to renounce them. The evidence gives no support to the claim that it disregarded or intended to break its promises. We conclude that, as found by the lower courts—rightly declining to follow the decision of the Circuit Court of Appeals for the Sixth Circuit in *Federal Life Ins. Co.* v. *Rascoe, supra*, 696—the company did not repudiate the policies. In view of that fact, we need not and therefore do not decide whether the doctrine of anticipatory breach is applicable to the class of cases to which this one belongs. *Dingley* v. *Oler, ubi supra.*

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.